GENDER-BLIND: INTERNATIONAL HUMAN RIGHTS ON ABORTION THROUGH IRISH EYES

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Dedication

To my parents for their love, Russell for his patience, and to Katharine. T. Bartlett for making me a scholar.

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INTRODUCTION

On May 26, 2018, media from across the globe descended on the courtyard of Dublin Castle, Ireland.[1] They had traveled to capture the scene of thousands of Irish people celebrating the results of the Irish abortion referendum, where a landslide majority of 66.4% voted to repeal the 8th amendment to the Irish Constitution.[2] Inserted in 1983 by a formidable anti-abortion lobby, the 8th amendment equated the right to life of the "mother" and the "unborn child" in the Constitution.[3] This amendment translated into a legal ban on abortion in all cases except where abortion was necessary to avert a substantial risk to a pregnant woman's life. Women who had abortions outside of the permitted exception, and anyone who assisted them, faced up to 14 years in prison.[4] As a result of these restrictions, approximately 4000 women traveled from Ireland to other jurisdictions to have abortions every year.[5] Another 1500 took abortion pills (illegally) at home.[6] An unknown number of women maintained unwanted pregnancies. But in May 2018, the people's vote provided a mandate to repeal the 8th amendment and end its punitive impacts on women. Followed by the Irish President's signing of the

[1] In this dissertation, "Ireland" refers to the Republic of Ireland in contrast to the geographical naming of the island.
[2] GOV'T OF IR., *Department of the Environment, Community and Local Government Referendum Results 1937-2019*, https://electionsireland.org/results/referendum/refresult.cfm?ref=201836R.
[3] Constitution of Ireland 1937 art. 40.3.3; Protection of Life During Pregnancy Act 2013, §§7–9 (Act No. 35/2013) (Ir.) [hereinafter, PLDPA].
[4] PLDPA, *id.* at §22(2).
[5] The Irish Family Planning Association estimates that from 1980 to 2017, at least 173,308 women traveled from the Republic of Ireland to the UK for abortions, Irish Family Planning Association, *Abortion in Ireland: Statistics*, IRISH FAMILY PLANNING ASSOCIATION www. ifpa/Hot-Topics/Abortion/Statistics. These estimates do not include women from Ireland who traveled to other countries, for example, the Netherlands or Spain.
[6] *See,* Abigail A. Aiken, *Experiences and characteristics of women seeking and completing at-home medical termination of pregnancy through online telemedicine in Ireland and Northern Ireland: a population-based analysis*, 124 (8) AN INT. J. OF OBSTETRICS AND GYNECOLOGY, 1208 (2016) [hereinafter, Aiken, *Online Telemedicine*).

Abortion Referendum Bill,[7] The repeal enabled the Oireachtas (parliament) to legalize abortion, and per its pre-referendum pledge to the public, the Oireachtas enacted a model permitting abortion, without restriction as to reason, up to 12 weeks into pregnancy, with a 72-hour waiting period.[8] Between 12 and 24 weeks, the model legalizes abortion in three situations: where the pregnancy is non-viable when it risks a woman's life or where it seriously endangers her health. After 24 weeks, abortion is legal only in cases of "fatal fetal abnormality."[9] [10]

Amongst the crowds of women and men celebrating the Repeal in Dublin Castle, international reporters wondered how the island that had long been considered Europe's conservative (and Catholic) outpost could have endorsed such a drastic change for reproductive rights. Nascent editorials, radio shows, and podcasts attempted to provide a definitive answer to the question "how the Yes vote was won," almost all providing a different rejoinder. To be fair, many factors influenced abortion law reform in Ireland: the diminished authority of the Catholic Church; increased public attention to the tragic stories of women denied life-saving abortions and women forced to carry non-viable pregnancies to term; the election of a younger and more diverse parliament; recognition that increasing numbers of Irish women were taking abortion pills in their own homes; international condemnation; a high youth voter turnout; and a poorly organized 'Vote No' campaign. Critically, the singular force that brought these elements together to deliver Repeal was the Irish abortion rights movement.

The repeal of the 8th amendment resulted from more than three decades of work by Irish pro-choice groups, most of which was carried out in a social and political environment that was deeply hostile to abortion rights. In 2018, pro-choice activists carried the 'Yes' vote high on the shoulders of a majority across the entire country — every constituency but one voted for reform. But for those who had long battled against the 8th amendment, the public scenes of joy following the referendum results were a far cry from the animosity directed towards pro-choice activism in years prior. For decades, the State dismissed their advocacy at every turn — in the courts, the legislative chamber, the voting booth, and the streets. The Catholic Church publicly denounced pro-choice activists. Women who had abortions (usually abroad) stayed silent in fear of enmity.[11] And even when the Church's moral

[7] President Higgins signed the 36th Amendment of the Constitution Bill 2018 on December 20, 2018. His signature officially changed the Constitution.

[8] The Health (Regulation of Termination of Pregnancy Act) 2018 (Act No. 31/2018), [hereinafter, Abortion Act 2018].

[9] The dissertation uses the term 'fatal fetal anomaly' to refer to pregnancies that suffer from fatal conditions. Such pregnancies are highly unlikely to survive to term or have a very short post-birth life. It is not an exact medical term.

[10] Abortion Act 2018, *supra* note 8 at §10-11.

[11] The shame surrounding abortion in Ireland, and the impact of that shame on women, played a fundamental part in the Irish abortion story. *See infra* Chapter 3 at 165-170. *See also* Christine Zampas, *Ireland: She is Not a*

monopoly dramatically declined in the late 1990s and 2000s, campaigners for abortion rights struggled against entrenched social stigma and unwavering political inaction.

Following two decades of defending against anti-choice attempts to enact even more abortion restrictions, in the early 2000s, pro-choice campaigners began planning a *proactive* challenge to the 8th amendment. Unable to get a proper hearing in the Irish legal system, they looked beyond Irish shores and took their claims to the European Court of Human Rights.[12] While their litigation was largely unsuccessful in securing abortion rights in Ireland, their efforts in Strasbourg gave their campaign political and legal traction.[13] And as activists challenged the State on the international stage, human rights advocacy also empowered and legitimized the movement at home. Strengthening the force of their demands and generating pressure for liberalization both inside and outside the country, international human rights advocacy elicited government concessions, increased mobilization, and bolstered the possibility of success.[14]

Notwithstanding its role as a lever for change, international human rights advocacy for abortion had some notable limits. From a pro-choice perspective, the scope of international human rights protection for abortion is lacking. The law has yet to affirm the right of a woman to choose abortion; instead, it requires states to decriminalize abortion and legalize abortion in cases where a pregnancy risks a woman's life or health, if a pregnancy is a result of rape, or in situations where the fetus has a fatal anomaly.[15] To be sure, legalizing abortion in such circumstances would have been an improvement on Ireland's total ban, but by the time the movement had gained enough legitimacy amongst national actors to secure a referendum for repeal of the 8th amendment, international human rights law — and its limited recognition of abortion rights — ran short as a resource. Offering much narrower protections for abortion rights than the guarantee of "free, safe and legal abortion for all" sought by the movement, human rights lost much of its liberating power.

This dissertation interrogates international human rights law's limits on abortion rights from a feminist perspective. From a women's rights perspective, the law's protection gap — the lack of recognition for abortion access as an affirmative, unqualified right — is a problem in and of itself. And from a feminist perspective, the gap is also indicative of a structural flaw in

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Criminal: The Impact of Ireland's Abortion Law, AMNESTY INT., (June 9, 2015), https://www.amnesty.org/en/documents/eur29/1597/2015/en/ [hereinafter, Zampas, *She is Not a Criminal*].

[12] A, B & C v. Ireland, 53 Eur. HR Rep. 13 (2011) [hereinafter, *A, B & C v. Ireland*] For discussion of this litigation, *see infra* note 221 and accompanying text.

[13] *See infra* Chapter 2, Human Rights in Action.

[14] *Id.*

[15] *Id.*

international law. This dissertation argues that the law is, for the most part, gender-blind and, as such, is ill-equipped to deal with the inequalities represented in, and engendered by, abortion restrictions. Exploring how the law fails to address the role of gender in both the purpose and effects of abortion restrictions, this dissertation critiques the doctrine's inattention to the biases underpinning abortion-restrictive regulation and the subordinating harms such laws inflict on women.[16] And by masking the ways that anti-abortion regulations institutionalize gender hierarchy, international human rights law runs the risk of sanctioning a power structure that disadvantages women.

Feminist scholars have long claimed the abortion right as *de rigeur* for gender equality. Some scholars contend that abortion restrictions constitute *de jure* discrimination against women because there exist no impediments to men seeking and obtaining any required medical intervention to protect their lives, health, and quality of life, i.e., women's rights are abridged in a way that men's are not.[17] Another version of this argument is that denying abortion involves the bodily co-optation of women for "the use and control of others" in a world where law and policy do not make similar demands of men's bodies.[18] Others contend that such laws are based on traditional assumptions about the "proper roles" that men and women should play in society — that women are responsible for children and the home while men's duties lie in the world of work and politics.[19] Enforcing these stereotypes through law engenders many equality concerns. First, mandating that women become mothers irrespective of their individual desires negates women's autonomy, a right necessary for women's recognition as equal agents in society.[20] Second, some feminists argue that by coercing women into motherhood — a social role that limits women's ability to participate as equals in the public sphere — abortion restrictive regulation constrains women's ability, as a class, to gain economic, political, and social power on an equal basis with men.[21] Under

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[16] *See infra* Chapter 3.

[17] *See, e.g.,* Cass Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 29-44 (1992). The author acknowledges that abortion restrictions can significantly impact men who are transgender and non-binary persons. But as the dissertation will demonstrate, abortion restrictions are animated by and perpetuate gender hierarchy between women and men. It is necessary for an equality theory on abortion to address the social category of women rather than a non-gendered personal form. The author hopes that just as Catharine MacKinnon's theory of sexual assault is of use to gender-diverse persons, the gender theory of abortion rights in this dissertation addresses the harms suffered by gender identity minorities who cannot realize their reproductive freedom.

[18] *See, e.g.,* Judith Jarvis Thompson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971); Andrew Koppleman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1984).

[19] *See, e.g.,* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) [hereinafter Reva Siegel, *Reasoning from the Body*]. Reva Siegel, *Equality and Choice: Sex Equality Perspectives on Reproductive Rights in the Work of Ruth Bader Ginsburg*, 25 COLUM. J. OF GENDER & L. 63 (2013); For an in-depth discussion, *see infra* Chapter 3.

[20] *See, e.g.,* Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 417–18 (2009) [hereinafter Sanger, *Decisional Dignity*]

[21] *See, e.g.,* Reva Siegel, *Reasoning from the Body, supra* note 20.

this view, anti-abortion laws impair women's equality not only because they subject women to a prescriptive role but also because the particular role in question—motherhood — comes with high costs to women's personal, educational, economic, and political lives. Such impacts are often heightened, depending on the context, for women of color, migrant women, and women in lower socio-economic circumstances.[22] The theory asserts that the cumulative ramifications of these associated with motherhood costs ensure that women — as a class — cannot gain the power and authority necessary to upend gendered inequalities.[23]

Notably, the social and legal history of abortion law in Ireland reflects much of this theory in practice. A gendered ideology drove the 8th amendment with women's role as mothers at its apex.[24] For most of the 20th century, establishing Ireland's status as a pious, patriarchal State required Irish women to adhere to strict rules about their sexuality and roles.[25] Deeply entrenched in law and policy, the status quo rarely faced challenges. As such, when women secured modest gains on contraception access in the late 1970s[26] The backlash was swift. Led by anti-choice politicians, segments of the Catholic hierarchy, and prominent members of the medical establishment, conservative forces mobilized to insert the 8th amendment into the Irish Constitution as a way to reassert women's obligation to bear and rear children.[27] To prevent what they saw as any further liberal encroachments on the "traditional order" that defined their aspirations for the nation, the 8th amendment and its recognition that the "unborn's" life was equal to that of the "mother" placed a constitutional barrier in the way of women's status as equal citizens.

Notwithstanding the many parallels, the Irish abortion story departs from the abortion narratives offered by feminist theorists in some critical ways. Irish women who sought abortions for any reason other than their imminent death could not have one in Ireland. But they could legally travel abroad to have one. As such, Irish abortion restrictions did not, in the majority, subject women to the harms of forced motherhood (though this indeed happened in some cases) just described.[28] Rather, the law communicated to all women that

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[22] *See, e.g.*, Risa Kaufman *State ERAs in the New Era: Securing Poor Women's Equality by Eliminating Reproductive-Based Discrimination*, 24 HARV. WOMEN'S LJ 190 (2001). The dissertation examines the discriminatory intersectional impacts of restrictive abortion laws in Chapter 3. See *infra* Chapter 3, pp 164-166.

[23] Reva Siegel, S*ex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 823-24 (2007) [hereinafter Reva Siegel, S*ex Equality Arguments*]. *See also*, Neil Siegel, *The New Textualism, Progressive Constitutionalism, and Abortion Rights*, 25 (1) YALE JOUR. OF LAW & THE HUMANITIES, 55 (2013).

[24] *See infra* Chapter 3 pp 150.

[25] *See generally,* LISA SMYTH, ABORTION AND NATION: THE POLITICS OF REPRODUCTION IN CONTEMPORARY IRELAND (2005); Siobhan Mullally, *Gendered Citizenship: Debating Reproductive Rights in Ireland* 27(1) H RTS. Q., 78 (2005).

[26] McGee v. Att'y Gen., [1974] IR 284 (Ir.) [hereinafter, McGee]. See also *infra* note 61 and accompanying text.

[27] *See infra* Chapter 3 at p.150.

[28] *See supra* note 20-23 and accompanying text.

the nation did not respect their autonomy and that they needed to leave if they wished to assert it; in addition to rejecting women's autonomy, forcing women abroad inflicted burdens of stigma and shame on thousands of women. [29] Generating a climate of fear and recrimination, the law drove women to conceal their actions and be silent about their abortions and their defiance of Irish laws. Censoring a striking legacy of women's resistance to the gendered State, the 8th amendment — and the punishing stigma it engendered — redoubled its efforts to suppress women's agency.[30]

In this way, the efforts of the Irish abortion rights movement can be seen as a struggle for the recognition of women's equality. They sought to "remove the shackles of abortion restrictions."[31] And say goodbye to an Ireland that brutally suppressed women. Repeal was less about whether abortions should be legally procurable in Ireland — with more than twelve Irish women having abortions every day, abortion was already very much an ingrained part of Irish reality — and more about delivering upon years of campaigning for a society of equals. The thousands who cried in Dublin Castle following the referendum results did so in delight, relief, and (dis)belief that such a society was in sight.[32]

Using the story of abortion law in Ireland as a contextual framework for its arguments, this dissertation studies the law and practice of human rights on abortion. An in-depth study of how Irish pro-choice campaigners used (or did not use) international human rights over the lifetime of the 8th amendment (1983 - 2018) offers timely insights for scholars, advocates, and policymakers seeking to understand the reach and influence of international human rights standards on abortion. This case study provides insights into the conditions under which the power of international human rights advocacy is amplified or stifled.

Concluding that international human rights law's equivocal recognition of abortion rights inhibited its utility as an emancipatory tool for abortion rights, this dissertation proceeds to its primary inquiry: an examination of the gendered limits of human rights law on abortion. Applying a feminist lens to current human rights law doctrine on abortion, the dissertation suggests that despite significant international law developments on abortion rights in the past 20 years, the relative invisibility of gender analysis is a critical limit on the law's transformative potential. The doctrine avoids scrutinizing the gender inequalities that animate abortion restrictions and provides an

[29] The dissertation develops this theory in Chapter 3.
[30] *Id*.
[31] Maeve Taylor et al., *The Irish Journey: Removing the shackles of abortion restrictions in Ireland* 62 BEST PRACT RES CLIN OBSTET GYNAECOL 36 (2020).
[32] *See The Irish Times view on the referendum: This belongs to the women of Ireland*, IR. TIMES (May 27, 2018), https://www.irishtimes.com/opinion/editorial/the-irish-times-view-on-the-referendum-this-belongs-to-the-women-of-ireland-1.3510518?mode=sample&auth-failed=1&pw-origin=.

incomplete account of the gendered effects of abortion restrictions. Moreover, in the cases where human rights law affirms women's abortion rights, this affirmation appears to depend on a woman's ability to fit the gendered mold of a powerless victim.

To foreground this dissertation's case study, Chapter 1 chronologizes the legal and political developments that shaped Irish abortion law. Beginning with the colonial import from Britain in 1856, the chapter documents both pro and anti-choice efforts to define abortion in Irish law right up to the post-repeal legal framework. Outlining the many political battles, the many constitutional referendums and a limited number of cases involving women who suffered under the 8th, and litigation and advocacy campaigns, the chapter describes the development of Irish abortion law, including its political and organizational dynamics.

Chapter 2 delves into these dynamics, focusing on the role of international human rights law in the Irish abortion law reform movement. The chapter first places abortion within the context of international human rights law by analyzing the origins and doctrinal development of international law standards on abortion. Following this analysis, the chapter maps and critically positions the use of international human rights advocacy over the 35-year lifespan of the 8th amendment. Adopting a longer view of Repeal than the referendum campaign, this analysis does not try to explain how "the Yes vote was won." Nor does it set out to prove that international human rights law was dispositive in delivering the referendum result. The study establishes the points at which human rights advocacy affected the movement and its goals — both transformative and ambivalent.

Chapter 3 contains the critique of international human rights law as gender-blind. The chapter first places abortion rights within feminist thought on the relationship between abortion rights and gender equality. To concretize and expand this line of feminist theory, the dissertation revisits the political and social history of abortion law in Ireland. Probing the roots of the 8th amendment and its considerable impacts on the lives of Irish women, the chapter exposes the gender stereotypes that undergirded the Irish law and the inequalities engendered. The concrete and status-based harms to women's autonomy are identified as critical subordinating impacts, while Ireland's censorship of women's resistive agency is highlighted as a previously unexplored feminist critique of abortion regulation. Building on this analysis and feminist critiques of international law, the dissertation examines the distinct ways that human rights law misses the gendered dynamics of abortion rights. First, the critique describes the law's overly deferential approach to national authorities in abortion cases and shows how it routinely leaves harmful abortion restrictions unscathed. Second, acknowledging the inroads that the doctrine has made in identifying many of the egregious impacts of

abortion restrictions on women, the critique asserts that the harms recognized to date are overly narrow - leaving fundamental equality concerns unaddressed, human rights law appears blind to the gender subordination perpetuated by abortion restrictions. Third, the critique establishes that the law trades in narratives about women and abortion that appear to condition women's recognition as rightsholders on their powerlessness. Including a brief discussion of how a gendered approach could be incorporated into human rights law in practice, the chapter suggests that rather than being overly radical, linking the abortion right with gender equality may have strategic as well as theoretical benefits.

The dissertation attempts to conclude by balancing the hopeful and critical lessons about human rights. Reminding the reader international human rights law helped propel Irish abortion law reform, the conclusion reiterates the empowering legitimizing, and mobilizing influences of human rights for reproductive rights movements. The dissertation suggests that this makes it all the more important for human rights law to remedy its gendered discords. Additionally, the author forewarns that a gendered human rights-based approach to abortion may prove especially important amidst the ascendency of transnational anti-gender equality politics. As movements seeking to roll back protections for women and LGBT+ persons proliferate, international human rights law needs to confront rather than conceal the politics of gender.

METHODOLOGY

To explore international human rights law and practice on abortion, this dissertation combines several scholarly approaches: doctrinal analysis, historical research, feminist legal methods, and an assessment of "law-in-action."[33]

A case study of the law, politics, and impacts of Ireland's abortion law concretizes the dissertation's analysis of international human rights and law and practice. To anchor the dissertation's reliance on the Irish abortion story, Chapter 1 uses legal and historical research — drawing from secondary literature, parliamentary debates (dating back to the formation of the State), judicial decisions, newspapers, and discussions with historians — to provide the necessary contextual background on abortion law and politics in Ireland.

Chapter 2 distills international human rights law standards on abortion from an in-depth analysis of international and regional human rights treaties and the jurisprudence emanating from the human rights monitoring mechanisms established under these treaties, namely regional courts and UN Treaty Monitoring Bodies.[34] This "jurisprudence" consists of case law and interpretive guidance from UN Treaty Monitoring Bodies in the form of "General Comments" or "Recommendations," which provide detailed interpretation of specific treaty provisions and "concluding observations" on States' compliance with the Treaty in question. Included in the assessment of the development of the normative standards on abortion are relevant international consensus documents and certain reports from UN Special Procedures. When analyzing certain case-law and the claims of the parties,[35] The author also used insight from her experience working as a human rights attaché with the Irish Department of Foreign Affairs from 2014-2015. Similarly, in-person experience informed her assessment of the CEDAW Committee's application of human rights law standards. Monitoring the CEDAW's review of Ireland in 2017 in Geneva and "off-the-record" discussions with CEDAW Committee members helped the author clarify (and later conceptualize) the Committee's approach to abortion.

Chapter 2 of the dissertation goes beyond looking at the content of international norms to focus on how activists used the norms in different spaces and contributed to forming the law. By studying archival campaign materials, judicial opinions, submissions to UN Treaty monitoring bodies,

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[33] Rebecca L. Sandefur, *When Is Law in Action?* 77 OHIO ST. L.J. 59 (2015)

[34] Treaty Monitoring Bodies are established under most UN human rights treaties to monitor State compliance with their treaty obligations.

[35] Mellet v. Ireland, U.N. Doc. CCPR/C/116/D/2324/2013 (2016) [hereinafter *Mellet v. Ireland*] and Whelan v Ireland, UN Doc CCPR/C/119/D/2425/2014 (2017) [hereinafter *Whelan v. Ireland*]

over 42 interviews with advocates,[36] newspapers and other media sources, the case study identifies who used human rights, when, where, and why. Providing a detailed qualitative and quantitative examination of the use of international human rights advocacy by pro-choice advocates during the 35-year lifespan of the 8th amendment, this "Human Rights Law in Action" study identifies the relative impacts of human rights strategies in the Irish context, both radical and moderate. The author situates this analysis within international relations and international law debates about the legitimacy and effectiveness of human rights law, institutions, and movements.[37] as well as social movement theories more broadly. The contextualized multi-disciplinary study contributes to these bodies of literature, particularly theories that emphasize social movements and activists as the entrepreneurs of human rights change.

Chapter 3's multilayered critique of human rights law on abortion relies on a number of feminist methods and insights. The chapter used feminist legal theory —primarily anti-stereotyping theory and anti-subordination theory — to explain why abortion restrictions are fundamentally a matter of gender inequality. Similar theoretical approaches inform the chapter's critique of international human rights jurisprudence, which also draws on long-standing "feminist international law critiques."[38] And while the dissertation devotes little attention to Catharine MacKinnon's insights on abortion rights, her methods — uncovering the gender of ostensibly neutral processes *and* demonstrating how that purported neutrality legitimates inequality[39] — are an edifice for much of this dissertation.

[36] The author interviewed individuals from leading non-governmental organizations, members of grassroots organizations, representatives of anti-choice organizations, lawyers involved in different cases, journalists, politicians who publicly advocated for abortion rights, government officials, and service providers, including those who helped women travel abroad or distributed the abortion pill. These interviews were in-person in the following locations: Dublin, Ireland, in June - July 2016 and June 2018; Belfast, Ireland in May 2016; Geneva, Switzerland in March 2017; and New York, USA in July 2018. Some advocates were interviewed twice, in June-July 2016, and following the referendum result.

[37] *See infra* Chapter 2.

[38] *See infra* Chapter 3.

[39] CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE [hereinafter CATHARINE A. MACKINNON]; Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983) [hereinafter MacKinnon, SIGNS 1I].

CHAPTER 1: THE IRISH ABORTION STORY: LEGAL AND POLITICAL TIMELINE

As in many nations that Britain once colonized, criminal prohibition on abortion in Ireland dated back to the British Offences Against the Person Act 1861. The Act codified a common law criminalization of abortion[40] and made it a criminal offense — punishable by life imprisonment —for a woman to procure her "own miscarriage."[41] Persons who assisted a woman seeking an abortion could also be convicted of a felony.[42] Though Ireland became a "free state" in 1922, the 1861 British act was carried over and remained on Irish statute books.[43] In 1983, the Irish people voted to enshrine in the Constitution a right to life for the fetus, which held equivalence with the right to life of the pregnant woman (the 8th amendment). In 2013, the Oireachtas (the Irish legislature) legislated on abortion for the first time, not to change the law, but to clarify that in cases where a pregnant woman's life was at risk, the criminality of abortion subsided.[44] Five years later, in May 2018, the Irish people voted by referendum to remove the 8th amendment and replace it with a text permitting the Oireachtas to legislate for liberal abortion access in Ireland.[45] In January 2019, a law to permit abortion access without restriction as to reason up to the 12th week of pregnancy came into force in Ireland.[46] This chapter charts the events that culminated in such a significant reform.

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[40] At common law, abortion of the "quickened fetus" was considered a "heinous misdemeanor." WILLIAM BLACKSTONE COMMENTARIES, 129-130 (4th ed. 1771). This misdemeanor became a felony in 1803 under Lord Ellenborough's Act 1803. *See also* SPUC v. Open Door [1988] IR 593, 597 (H.Ct.) (Ir.).

[41] §58 of the Offences Against the Person Act 1861 provided that: "Every woman, being with child, who, with intent to procure her miscarriage, shall unlawfully administer to herself any poison or other noxious thing or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or not be with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of a felony, and being convicted thereof shall be liable to be kept in penal servitude for life."

[42] Under § 59, assisting with the procurement of abortion was also criminal. The move to criminalize abortion in the UK was in part due to the efforts of the (male-dominated) medical profession to control reproductive medicine. *See generally* COMPLAINTS AND DISORDERS: THE SEXUAL POLITICS OF SICKNESS (Barbara Ehrenreich eds., 1974).

[43] Before 1922, Ireland was part of the United Kingdom, which governed the territory by direct rule. In 1921, the Government of the United Kingdom of Great Britain and Ireland partitioned the island into two self-governing polities: Northern Ireland and Southern Ireland. Six counties in the north remained part of the United Kingdom while the other 26 counties on the island gained limited independence, becoming the Irish Free State. In 1949, the Free State became the Republic of Ireland.

[44] PLDPA *supra* note 3. This Act reaffirmed abortion as an illegal practice in Ireland and retained the punishment of a maximum of 14 years in imprisonment for procuring one in Ireland. The Act sets out specific incidents where termination was legal under the 'mother's life-at-risk' exemption.

[45] The Thirty-sixth Amendment of the Constitution Bill 2018 (Act No. C36/2018) (Ir.) stated that "provision may be made by law for the regulation of termination of pregnancy."

[46] Abortion Act 2018, *supra* note 8.

A. Law and Abortion in the Irish Free State 1922-1983

As in all jurisdictions where abortion is restricted, women in Ireland with unwanted pregnancies tried to end them.[47] In a State that also banned the import and sale of contraceptives until 1979, at which point it became legal only for married women,[48] the number of unplanned pregnancies was likely very high. For many Irish women, this prohibitive regime around family planning meant a reproductive lifetime of becoming pregnant year on year, giving birth to a child after child once married.[49] Others, however, challenged this fate, and while the data is limited, there exists a hushed history of illegal abortion, along with infanticide, birth concealment, and self-harm when pregnant.[50] For those who aborted their pregnancies, most did so without ever coming into contact with authorities by relying on an underground network of 'handywomen'—self-trained abortion providers— or taking pills and potions at home.[51] Several abortion providers, however, faced criminal sanction; records from 1922 to 1968 indicate a small flow of prosecutions under the Offences Against the Person Act 1861 for those who assisted with or carried out abortions.[52] One provider was even sentenced to death when a woman died after receiving an abortion from her.[53]

Legal developments in mid-century Britain gradually helped provide a safer and legal alternative for women seeking to end their pregnancies. In 1939, *Rex v. Bourne* provided a defense for assisting with or carrying out abortion under the Offences Against the Person Act, where the Act was done "in good faith for the purpose only of preserving the life of the mother."[54] The Court distinguished between "unlawful abortion" as prohibited by sections 58

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[47] Countries with stricter abortion laws have higher abortion rates than countries with liberal laws. The abortion rate is 37 per 1,000 women in countries that prohibit abortion altogether or allow it only to save a woman's life and 34 per 1,000 in countries that allow abortion without restriction as to the reason. *See*, Guttmacher Institute, *Unintended Pregnancy, and Abortion Worldwide* (2020) https://www.guttmacher.org/fact-sheet/induced-abortion-worldwide.

[48] Irish Statute Book: Criminal Law Amendment Act, 1935 (Pub. Stat. No. 6/1935) § 17) 17(1) provided that "It shall not be lawful for any person to sell, or expose, offer, advertise, or keep for sale or to import or attempt to import into Saorstat Eireann for sale, any contraceptive." Historian Sandra McAvoy contends that this law was a response by the Free State to purported contraception access and suspected abortifacient use. *See* Sandra McAvoy, *From Anti-Amendment Campaigns to Demanding Reproductive Justice: The Changing Landscape of Abortion Rights Activism in Ireland*, 1983–2008 in JENNIFER SCHWEPPE, THE UNBORN CHILD, ARTICLE 40.3.3 AND ABORTION IN IRELAND 15-27. [hereinafter, Sandra McAvoy]

[49] CIARA MEEHAN, A JUST SOCIETY FOR IRELAND? 1964-1987, 167 (2013) (Kindle Reader) [hereinafter, CIARA MEEHAN].

[50] *See, e.g.,* Pauline Conroy, "*Dúirt bean liom," 'A woman told me,' Punishing the productive and the reproductive* in, THE ABORTION PAPERS, VOLUME 2 (Aideen Quility ed., 2015) 34, 40 (describing how the State's prohibition on abortion and contraception led to women adopting other means of "fertility control" including Magdalene laundries for women pregnant with an illegitimate child, infanticide, birth concealment, and illegal abortion).

[51] *See, e.g.,* Cara Delay, *Pills, Potions, and Purgatives: Women and Abortion Methods in Ireland, 1900-1950* WOMEN'S HIST. REV. (2018), https://www.tandfonline.com/doi/abs/10.1080/09612025.2018.1493138.

[52] PAULINE JACKSON, THE DEADLY SOLUTION TO AN IRISH PROBLEM: BACKSTREET ABORTION (1983) 2 (suggesting that there were 58 illegal abortion cases investigated or tried in Ireland between 1926 and 1974).

[53] *Id.*

[54] I939 1 KB 687, 694.

and 59 of the Act and the "lawful abortion" in the *Bourne* case where the defendant surgeon gave an abortion to a 14-year-old victim of rape.[55] The Court noted that an abortion to end a pregnancy that would otherwise "make the woman a physical or mental wreck" could also be interpreted as life-saving.[56]

Despite involving the same abortion legislation that governed Ireland, *Bourne* was not a binding precedent in Ireland. As a separate legal system, the decision of the English Court had no direct influence on Irish law.[57] Travel to the UK for abortion rose following *Bourne,* but border restrictions travel during WWII and the relatively narrow parameters of the criminal exemption limited abortion travel.[58] However, the next shift in British abortion law had a dramatic impact on abortion travel. The Abortion Act of 1967, which became law on April 27, 1968, in parts of Britain[59] provided that:

> (1) . . . [A] person shall not be guilty of an offense under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith-
>
> (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated;
>
> or (b) that there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.[60]

Born from a combination of public health concerns about congenital disabilities caused by thalidomide.[61], maternal deaths from unsafe abortion,

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[55] *Id.* at 695.
[56] *Id.* at 696.
[57] See SPUC v Grogan (no. 5) [1998] 4 IR 343, 381-382, (where McNaughten J stated the prevailing legal view was that "the Bourne approach could not have been adopted in this country consistent with the Constitution prior to the 8th Amendment." *See also* Hamilton CJ in X v Att'y Gen., [1992] 1 IR.
[58] *See, e.g.,* Pauline Jackson, *Trials and Tribulations,* 18(1) CANADIAN J. OF IRISH STUD., WOMEN AND IRISH POL. 112, 113-114 (1992) (arguing that Irish women traveled to mainland Britain to seek abortions before the 1967 Act, but travel was expensive and complicated and during the Second World War it severely restricted. From 1939 to 1946, journies to the UK required a police-issued travel permit which expanded the market for illegal abortion on Irish soil.
[59] The Act was not extended to Northern Ireland.
[60] Abortion Act 1967 §1, 87 HALS. STAT http://www.legislation.gov.uk/ukpga/1967/87/section/1/enacted.
[61] Thalidomide was a medication widely prescribed for pregnant women in the United Kingdom to ease morning sickness but was later discovered to cause severe impairments in fetal development. *See generally*, Kate Gleeson, *Persuading Parliament: Abortion Law Reform in the U*K, 22(2) AUSTRALASIAN PARLIAMENTARY REV. 23, 24,

and a growing abortion rights movement,[62] the Act dramatically expanded legal abortion access in Britain by expanding the exemptions to the criminalization of abortion under the Offences Against the Person Act. Under the Abortion Act, which remains in place today, a person is not guilty of a crime if the abortion is carried out on licensed premises by a registered medical practitioner[63] (i) following a good faith opinion that the pregnancy could be injurious to the physical or mental health of the woman or her family, or (ii) up to twenty-four weeks in the case of a severely handicapped fetus.[64] The legislation had no legal effect in Ireland (which was, by this point, a Republic)[65] but thousands of Irish women felt its impact for decades to come.[66] Women with money to pay for travel and the procedure in the UK could now legally end unwanted pregnancies across the Irish Sea. The resulting "abortion trail" [67] — traveled by thousands of Irish women — lasted for over 50 years.

B. Constitutional Amendment (1983)

Britain was not alone in liberalizing its abortion law in this era (the late '60s and '70s); the United States legalized abortion in 1973, France in 1975, Sweden in 1974, Germany in 1976, Italy in 1978, the Netherlands in 1981. Ireland, however, moved in the opposite direction. In 1983, it became the first country in the world to enshrine in its Constitution a right to life for the "unborn." Inserted via constitutional amendment, the right to life of the "unborn" held equivalence to the right to life of the pregnant woman, reading as follows:

> The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.[68]

A formidable civil society movement orchestrated the amendment's passage. Officially launched in April 1981, the Pro-Life Amendment

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30, 31 (2007).

[62] *See, e.g.,* DAVID MARSH, ABORTION POLITICS (1981).

[63] There have been recent developments on this. *See, e.g.,* BBC News, *Judge Throws Out Challenge to Scots Abortion Pill Move*, BBC (August 15, 2018), https://www.bbc.co.uk/news/uk-scotland-45196213.

[64] SALLY SHELDON, BEYOND CONTROL: MEDICAL POWER AND ABORTION CONTROL (1997).

[65] Ireland became a republic in 1937. *See supra* note 37.

[66] *See, e.g.,* Brian Girvan, *Social Change and Moral Politics: the Irish Constitutional Referendum 1983*, 34 (1) POL. STUD. 61 (1986).

[67] *See* ANN ROSSITER, IRELAND'S HIDDEN DIASPORA: THE ABORTION TRAIL AND THE MAKING OF A LONDON-IRISH UNDERGROUND, 1980-2000 (2009).

[68] Constitution of Ireland 1937 art. 40.3.3.

Campaign (PLAC) comprised a myriad of Catholic and other pro-life groups; it had the support of the Irish Medical Association, the majority of elected politicians, and the Catholic Church hierarchy.[69] PLAC's official argument was that a "pro-life" constitutional amendment was necessary to prevent judicial development of a constitutional right to abortion as had happened in the United States in *Roe v. Wade*.[70] This fear of judicial activism seemingly arose following the 1974 Irish case of *McGee v AG*.[71] where the Court inferred a constitutional right to contraception for married couples from an unenumerated constitutional right to marital privacy.[72] Without decisive legal action, the PLAC argued, the Irish Supreme Court could do what the US Supreme Court had done in *Roe* and extend the holding in *McGee* to infer a right to abortion.[73]

In reality, the specter of an extension of the law to define a right to abortion following *McGee* seemed unlikely. The Irish Supreme Court had been explicit in *McGee v A*G, albeit *obiter dicta*, that the right to contraception did not extend to limiting family size by abortion.[74] As to the argument that potential judicial activism in Ireland had to be blocked, it is not clear whom

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[69] *See generally* TOM HESKETH, THE SECOND PARTITIONING OF IRELAND: THE ABORTION REFERENDUM OF 1983 (1990) (describing the history and goals of PLAC); *see also* EMILY O' REILLY, MASTERMINDS OF THE RIGHT; Rosanna Cooney, *Story of the 8th: How Right-Wing Catholic Groups Staged a Remarkable Political Coup*, JOE.IE, https://www.joe.ie/life-style/story-of-the-8th-how-right-wing-catholic-groups-staged-a-remarkable-political-coup-614595. *See also*, Fintan O'Toole, *Why Ireland Became the Only Country in the World to Have a Constitutional Ban on Abortion*, IR. TIMES, (August 26, 2014), http://www.irishtimes.com/news/politics/why-ireland-became-the-only-country-in-the-democratic-world-to-have-a-constitutional-ban-on-abortion-1.1907610.

[70] 410 US 113 (1973).

[71] *McGee*, *supra* note 25. The importation of contraceptives had been illegal since 1935. Mrs. Mary McGee was twenty-seven years old when she gave birth to her third and fourth children, twin daughters in November of 1970. Following the birth, McGee's doctor advised her that another pregnancy could endanger her life because her latest pregnancies had been "complicated by serious attacks of cerebral thrombosis." Mrs. McGee attempted to follow her doctor's orders by ordering contraceptive jelly from the United Kingdom to stop her from conceiving again. However, customs officials, citing the 1935 statute, seized McGee's contraceptives when they arrived in Ireland, which prompted her to challenge the restrictive law. On December 19, 1973, the Irish Supreme Court ruled that the McGee's right to privacy within their marriage trumped legal prohibitions on importing contraceptives. It was 1979 before a Health (Family Planning) Act enabled married couples to request contraceptives, including condoms, on prescription – though provision was made for doctors to refuse to provide this service on conscientious grounds. It was 1993 before condoms became freely available, without an age limit, from commercial outlets and vending machines. *See* Sandra McEvoy, *The Catholic Church and Fertility Control in Ireland: the Making of a Dystopian Regime*, in THE ABORTION PAPERS: VOLUME 2, 49 (Aideen Quility ed., 2015). [hereinafter, Sandra McEvoy, *The Catholic Church and Fertility Control in Ireland*].

[72] [1974] IR 284-85; Constitution of Ireland art. 40.3.1, "The State guarantees in its laws to respect, and as far as practicable, by its law to defend and vindicate the personal rights of the citizen." Article 41.1.1 states, "The state recognizes the family as the natural, primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law."

[73] William Binchy, *Marital Privacy and Family Law: A Reply to Mr. O'Reilly*, 66 IRISH STUD. (1977) 264, 333; William Binchy, *The need for a Constitutional Amendment* in ABORTION AND LAW: DOCTRINE AND LIFE, (AUSTIN FLANNERY. EDS. 1983) 116, 121 (William Binchy was the chief legal advisor of PLAC). *See also* Ursula Barry, *Abortion in the Republic of Ireland*, 29 FEMINIST L. REV. 57, 58 (1988).

[74] In *McGee*, Justice Walsh stated that "any action on the part of either the husband and wife or of the State to limit family sizes by endangering or destroying human life must necessarily not only be an offense against the common good but also against the guaranteed personal rights of the human life in question." McGee, *supra* note 13. Nevertheless, the pro-life lobby claimed that "whilst these views expressed by the learned judge are encouraging they do not in themselves, of course, afford any adequate legal Constitutional protection for the unborn." *See*, The Irish Association Lawyers for The Defence of the Unborn, Newsletter 2 (1983).

PLAC believed could mount a legal attack that would persuade the judiciary to liberalize access to abortion in deeply Catholic 1980s Ireland.[75] There was no fervent national movement to legalize abortion at the time that needed to be defended against.[76] Though, in February 1980, Ireland had its first-ever "Women's Right to Choose" public meeting in Trinity College Dublin,[77] students mostly attended it, and the informal organization was the only group in the country speaking out in favor of abortion rights.[78] Additionally, its resources were predominantly spent establishing and maintaining the Irish Pregnancy Counselling Centre to provide counseling services to pregnant women and abortion referrals to British clinics when requested.[79] The Well Woman Centre, another non-directive counseling center, was the only other organization concerned with abortion, and the Centre's focus was on referrals to the UK rather than legal mobilization. By contrast, "pro-life" groups dominated Irish civil society. The most prominent group, the Society for the Protection of the Unborn Child (SPUC), originally an English organization formed to oppose Britain's 1967 Abortion Act, held demonstrations up and down the country, visited classrooms without restriction to display supposed visuals of abortion procedures, and held hundreds of public meetings.[80] SPUC was so well organized and well-resourced that it ultimately provided PLAC with a ready-made network of campaigners in every parish.[81]

Nor was the legislature a threat. No representative in the Oireachtas had ever suggested that they favor liberalizing abortion law in Ireland. The statutory prohibitions of the Offences against the Person Act had been reaffirmed in Irish law in 1979[82] and protection for the "unborn child" had repeatedly been recognized in legislation.[83] Legally and politically, the

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[75] A rich body of scholarship has examined the impact of the Catholic Church on Ireland in the 20th century and, in particular, on the State's suppression of women. *See* Caitriona Beaumont, *Women, Citizenship and Catholicism in the Irish Free State, 1922-1948*, 6 WOMEN'S HIST. REV. 563 (1997); Yvonne Scannal, *The Constitution and the Role of Women*, 111, DE VALERA'S CONSTITUTION AND OURS: THOMAS DAVIS LECTURES (Brian Farrell ed., 1988); Maebh Harding, "Religion and Family law in Ireland," *159*, *The Place of Religion in Family Law: A Comparative Search* (Jane Mair, eds. 2011) 159; NO COUNTRY FOR WOMEN, (RTE 2018).

[76] As will be discussed in the next chapter, the Irish women's movement of the 60s and 70s made gains on contraception access, rights for unmarried mothers, and women's property rights. However, abortion was not a priority for the many women's campaigns of this time. *See, e.g.,* Pauline Conroy, "*Dúirt bean liom… A woman told me… Punishing the productive and the reproductive*" 34 in THE ABORTION PAPERS IRELAND: VOLUME 2, 43 (Aideen Quility ed., 2015).

[77] Rosanna Cooney, *Story of the 8th: how right-wing Catholic groups staged a remarkable political coup*, JOE. IE, https://www.joe.ie/life-style/story-of-the-8th-how-right-wing-catholic-groups-staged-a-remarkable-political-coup-614595; EMILY O' REILLY, MASTERMINDS OF THE RIGHT, 56. *See generally* Sandra McEvoy, *supra* note 65 at 21-22.

[78] *Id.*

[79] *Id*.

[80] CIARA MEEHAN, s*upra* note 49. EMILY O'REILLY, MASTERMINDS OF THE RIGHT, 54.

[81] Ciara Meehan, *id*.

[82] Health (Family Planning) Act 1979 (Act No. 20/1979), §10.

[83] Civil Liability Act 1961, (Act No. 41/1961), §58, (outlining clearly that "for the avoidance of doubt it is hereby declared that the law relating to wrongs shall apply to an unborn child for his protection in like manner as if the child were born, provided the child is subsequently born alive.") *See also* Brenda Daly, *Braxton Hick's or the Birth of a New Era – Tracing the Development of Ireland's Abortion Laws in Respect of European Court of Human Rights Jurisprudence* 18 EUR. J. OF HEALTH L. 375, 376 (2011).

"unborn" was safe in Ireland.

Some members of the PLAC movement entertained legal possibilities other than a referendum to prevent abortion access, including criminalizing women who had abortions abroad, physically preventing women from leaving the country to have abortions, or prosecuting abortion referral agencies.[84] Such proposals were deemed unworkable or unpalatable; PLAC's legal adviser conceded that prosecuting women for traveling to England for abortions or attempts to physically stop women from traveling could provoke harsh criticism that Irish politicians would likely not be able to withstand.[85]

Notwithstanding the implausibility of PLAC's assessment of the need for a constitutional amendment to prevent the liberalization of abortion law in Ireland, the group managed to secure a commitment from the leaders of Ireland's two main political parties – Fine Gael and Fianna Fáil – for a constitutional referendum on abortion. Contemporaneous commentators describe the 1983 referendum campaign as an enraged and divisive battle.[86] but securing the initial political agreement to hold a referendum was surprisingly easy for the PLAC. Instability characterized Irish electoral politics in the early 1980s – there were three general elections in the 14 months between June 1981 and November 1982 – and the respective party leaders were eager to appease an influential conservative alliance like PLAC.[87] Additionally, the party leaders did not want to risk being labeled "baby killers" during a chronic election cycle.[88] Writing at the time, a former Government minister turned political commentator described the decisions of the two-party leaders as "nothing to do with the right to life of the unborn, except the right of politicians to political life."[89] Both political parties embraced the PLAC's demand for a constitutional amendment, but the wording of the amendment itself became a matter of political football between the two political parties.[90] Each respective draft legal text was grounded in attempts to satisfy the PLAC lobby, engage different religious leaders, and consolidate political support.[91] In November 1982, the outgoing Fianna Fáil Government published a draft version of the amendment:

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[84] *See, e.g.*, EMILY O'REILLY, MASTERMINDS OF THE RIGHTS, 61 (1997); John Quinlan, *The Right to Life of the Unborn-An Assessment of the Eighth Amendment to the Irish Constitution* 1984 BYU L. Rev. 371 (1984).

[85] William Binchy, *Ethical Issues in Reproductive Medicine, A Legal Perspective in* ETHICAL ISSUES IN REPRODUCTIVE MEDICINE 27(Maurice Reidy ed., 1982).

[86] *See, e.g.,* PAULINE CONROY, THE ABORTION PAPERS IRELAND: VOLUME 2 (Aideen Quilty ed., 2015) (describing "a vile and venomous atmosphere of denunciation and hatred").

[87] *See, e.g.,* 339 No. 10 Dáil Deb. Prionsias de Rossa, (Feb. 9, 1985) (Ir.) https://www.oireachtas.ie/en/debates/debate/dail/1983-02-09/3/.

[88] *See, e.g.,* CIARA MEEHAN, *Supra* note 49 quoting journalist Gene Kerrigan who commented that "FitzGerald knew that if he didn't agree to pressure from the Knights of Columbanus-sponsored campaign, he would be in danger of being daubed a baby murderer while trying to fight an election."

[89] EMILY O'REILLY, MASTERMINDS OF THE RIGHTS, 79 (1997) (quoting Conor Cruise O'Brien).

[90] For a detailed account of this, see TOM HESKETH, THE SECOND PARTITIONING OF IRELAND: THE ABORTION REFERENDUM OF 1983 (1990), Chps VI and VII.

[91] Tom Hesketh describes how the government circulated different amendment drafts to various interest groups.

> The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

No sooner had the incoming Fine Gael Government leader and Taoiseach, Garret Fitzgerald, approved the outgoing government's draft than he began to consider alternative versions to satisfy others within his party.[92] His Attorney General conveyed grave concerns about the indeterminacy of the wording, contending that the amendment could legally prevent doctors from intervening when a woman's life was at risk or require the Oireachtas (parliament) to legislate for abortion.[93] Others raised the fact that the amendment provided no definitions for phrases such as the "unborn,"[94] "due regard" or "as far as practicable." Nor had the drafters provided guidance on how law, policy, or practice could reconcile the equivalence between the right to life of the unborn and the right to life of the "mother" in case of a conflict between the two.[95]

To address the legal uncertainty, the Taoiseach proposed a new text; "[n]othing in this Constitution shall be invoked to invalidate, or to deprive of force or affect any provision of a law on the ground that it prohibits abortion."[96] However, the pro-life lobby and their parliamentary allies rejected this version. The anti-abortion lobby considered it insufficient to insert a clause into the Constitution prohibiting the legislature from legalizing abortion; they sought to affirmatively assert fetal rights and looked to the State to 'vindicate' those rights.[97] No country had ever included fetal rights in its Constitution, but this radical aspect of PLAC's proposal did not reduce its influence over the process. The government abandoned their text and proposed PLAC's favored draft to the Oireachtas as follows:

Protestant churches were among these groups and opposed the amendment, believing that it enforced Catholic morals in the State's laws. The Church opposed abortion but felt that the Constitution was not an appropriate place for its regulation. TOM HESKETH, THE SECOND PARTITIONING OF IRELAND: THE ABORTION REFERENDUM OF 1983, 158 (1990).

[92] *Id.* 141.

[93] Statement of Attorney General, Mr. Peter D. Sutherland, S.C., quoted from The Ir. Times, 340 Dáil Deb. (February 16, 1983) col.473; *See also*, John A. Quinlan, *The Right to Life of the Unborn-An Assessment of the Eighth Amendment to the Irish Constitution*, 1984 BYU L. REV. 371, 389 (1984) [hereinafter, John A. Quinlan, *The Right to Life*].

[94] Tom Hesketh reveals that even PLAC was worried about the ambiguity of the draft amendment at an earlier stage. The Irish version of the amendment (which takes precedence over the English version as per Article 25.5.4. of the Constitution) calmed their fears because this version was less ambiguous about the unborn, and they were satisfied that it could not be interpreted as meaning 'an unborn viable child' but rather the unborn fetus from conception. TOM HESKETH,163.

[95] *See, e.g.,* Memorandum from Peter Sutherland, February 8, 1982, 2012/90/667, DEP'T OF TAOISEACH, NAT'L ARCHIVES OF IR.

[96] 341 Dáil Deb. 2225-30 (1983.

[97] *See, e.g.,* 341 Dáil Deb. 2225-30 (1983). *See also*, John A. Quinlan, *The Right to Life* supra note 93.

> The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.[98]

A majority of the Oireachtas voted in its favor and set a date to put the amendment to a public vote.

Individual public representatives actively campaigned with PLAC, but on the whole, political parties did not feature strongly in the public referendum campaign that followed.[99] The campaign was fought chiefly between PLAC and an emergent Anti-Amendment Campaign (AAC). The AAC, established in mid-1982, was a loose coalition of (i) pro-choice groups including feminists, trade unions, and some liberal politicians; and (ii) a small cohort of more conservative politicians, a small number of lawyers and medics, and most non-Catholic religious leaders in the country.[100] The liberal faction of the AAC ceded to the more conservative voices in the group such that the AAC coalition did not lead an openly "pro-choice" campaign. A woman's right to abortion, even in limited circumstances, was rarely mentioned.[101] A Workers' Party leaflet, which called for a "No" vote in the referendum, did not mention abortion or women.[102] For what they considered to be strategic reasons, the AAC did not advocate for women's rights and focused on attacking the legitimacy of holding a constitutional referendum on abortion, characterizing the amendment as "ill-considered, unnecessary, sectarian."[103] and "a rubbishly academic exercise."[104] The AAC also argued that the referendum was a waste of public money, that improving supports for unmarried mothers and their children was a more worthwhile use of resources, and that the amendment campaign represented a retreat from Ireland's emerging openness as a member of the EU.[105]

Several members of the AAC opposed abortion rights but were concerned about what they perceived as the "sectarian" nature of the amendment. In a context where one of the reasons why Protestants in the North of Ireland opposed a united Ireland was the feat that "Home Rule would mean Rome

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[98] Constitution of Ireland 1937 art. 40.3.3.

[99] TOM HESKETH, su67 (noting that the TD Oliver Flanagan, Tom O'Donnell, Michael Joe Cosgrave, and Alice Glenn campaigned actively in favor of the amendment with PLAC).

[100] TOM HESKETH, 81; *See also, Story of the 8th* JOE. IE, https://www.joe.ie/life-style/story-of-the-8th-how-right-wing-catholic-groups-staged-a-remarkable-political-coup-614595.

[101] Maev Kennedy, *Women 'shut out' from debate*,' THE IR. TIMES, September 5, p.11.

[102] *See, e.g.,* BRIAN GIRVIN, SOCIAL CHANGE AND MORAL POLITICS, 66 (1986).

[103] Prionsias de Rossa, Dáil Éireann, (Feb 9th, 1983), https://www.oireachtas.ie/en/debates/debate/dail/1983-02-09/3/.

[104] Quote by Mary Robinson, in TOM HESKETH, *supra* note _ p 96.

[105] Sandra McEvoy, *supra* note 10, at 25; Niall Kiely, *Dean Griffin urges a 'truly republican and pluralist Ireland*, THE IR. TIMES, (September 5, 2013) at 3.

Rule," some AAC members worried that a constitutional provision reflecting distinct Catholic teaching would validate Protestant hesitancy about ever rejoining the South.[106] In particular, they argued that using the Constitution — with its relative permanency and legal supremacy — to protect the 'right to life of the unborn' would communicate to Ireland's minority Protestant community that living in Ireland meant living under the thumb of the Catholic Church. By contrast, they suggested, if abortion was *legislatively*, rather than *constitutionally*, prohibited, Northern Protestants might feel secure that minority positions on social issues could at least be considered and debated, rather summarily subsumed by Catholic fundamentalism.[107]

Some, albeit very few local grassroots AAC groups, were headed by openly pro-choice activists, particularly in the urban centers of Dublin and Cork. The AAC, however, generally tamed the more emancipatory claims about women's abortion rights.[108] Notably, the activists who foregrounded pro-choice arguments were sometimes accused of "playing into the hands of PLAC" for voicing their support of abortion rights.[109] At times, the AAC echoed the concerns about the ambiguous language of the amendment and the potentially life-threatening legal and medical confusion it could produce, but the office of the Attorney General was entirely alone in publicly prioritizing questions about what it would mean for a "mother" to have an equal right to life to that of the "unborn" she carries,[110] or what state defense of the "unborn's" right to life "as far as practicable" would look like.[111] Would the right to life of the unborn be subject to exceptions? Would constitutional recognition of the "unborn's" right to life prevent women from going abroad to have abortions? This latter question was posed by civil servants in the attorney general's office on several occasions but not the AAC; presumably, the AAC did not want to seem to be approving of abortion by travel.

The reticence of the AAC to foreground the legal and practical impacts of the 8th on pregnant women was matched by the fervor with which the PLAC positioned "the unborn" as the subject of the referendum. Similar to American anti-abortion discourse at the time, the fetus was presented as a

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[106] TOM HESKETH, *supra* note _ at 93.

[107] *See, e.g.*, TOM HESKETH, 57, 70-71. In the 1980s, the Fine Gael government sought to reassure Protestant Unionists in Northern Ireland that the republic was not the Catholic theocracy they feared. *See also* CIARA MEEHAN, *supra* note 74 at pp 160-164.

[108] Sandra McEvoy, *supra* note 10, 35.

[109] *See also* Sandra McEvoy, *supra* note 10, at 26. (Describing how some activists, primarily working-class feminists, broke away from AAC to form the "Women's Right to Choose Campaign" to make arguments about women's rights).

[110] It was not until 2009 that the meaning of 'unborn' was judicially determined as being the "embryo or fetus in the womb from implantation" Roche v. Roche [2009] IESC 82. In 2013, §2 of the PLDPA provided that, for its purposes, "unborn" is a reference to human life during the period of time commencing after implantation in the womb of a woman and ending on the complete emergence of the life from the body of the woman'. PLDPA, *supra* note 3.

[111] *See e.g.*, John Quinlan, 397-398. See also, 339 Dáil Deb. (February 9, 1983) col. 1357.

vulnerable and innocent citizen that needed protection.[112] The Catholic Press asserted that the amendment was "profoundly positive" given that "that innocent human life has an intrinsic value.[113] The Society for the Protection of the Unborn (SPUC) circulated a flyer ***a***sking people to make their votes count for "those with no voice and no vote."[114] Evoking the post-colonial sensibilities of Irish people, another of their pamphlets presented the amendment as a means of defending the unborn from "the abortion mills of England that grind Irish babies into the blood that cries out to heaven for vengeance."[115] Women, when featured in the PLAC campaign, were presented as one of the threats from which the unborn needed the amendment's protection. The Catholic Bishop of Clonfert, Joseph Cassidy, claimed that the most dangerous place for an Irish baby to be was in its mother's womb.[116]

Following a campaign dominated by pro-amendment forces, just 54.6% of the electorate went to the polls on September 7, 1983— one of the lowest referendum turnouts in Irish history. 68% voted in favor of the "pro-life" clause, and 32% voted against it.[117] And though the anti-abortion lobby claimed that the 8th proclaimed the nation's morals definitively, the precise legal meaning of the 8th remained decidedly unclear. The Offences Against the Person Act and its near-absolute prohibition on abortion remained on the books, but there was no regulation to implement the 8th amendment. Critically, there was no guidance for women, healthcare professionals, or state officials on how to execute the 8th's declared equivalence between the right to life of "the unborn" and the right to life of "the mother." Over the next 40 years, this nebulous unknown of the 8th amendment manifested painfully in the country.

C. Legal Campaign After 1983

The 1983 abortion amendment quickly became the most litigated amendment of the Irish Constitution. Though the legal cases and the political battles surrounding such cases are complicated chronologically, the primary theme is recurrent; anti-abortion groups sought sweeping enforcement of the amendment via the Irish courts, requiring pro-choice groups to defend against even more restrictions on abortion access.

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[112] *See e.g.*, KRISTIN LUKER, ABORTION: THE POLITICS OF MOTHERHOOD (1984).
[113] As quoted in TOM HESKETH, *supra* note xx at 49.
[114] Society for the Protection of Unborn Children pamphlet, "Value Your Voice— Value Your Vote."
[115] *See, e.g.,* Sophie Cacciaguidi-Fahy, *The Substantive Issue and the Rhetoric of the Abortion Debate in Ireland*, *in* CONTEMPORARY ISSUES OF THE SEMIOTICS OF LAW 141, 147 (Anne Wagner et al. eds., 2005).
[116] *See, e.g.*, NELL MCCAFFERTY, A WOMAN TO BLAME: THE KERRY BABIES CASE 10 (2010).
[117] DEP'T OF THE ENV'T, CMTY. AND LOC. GOV'T REFERENDUM RESULTS 1937-2015, 38. *See generally,* Sandra McEvoy, *supra* note 10, at 28.

1. *SPUC v. Open Door (1986)*

Following the anti-choice victory, most Irish pro-choice groups disbanded. Activists switched from advocacy to the provision of non-directive counseling to women who sought abortion services abroad.[118] The Woman's Right to Choose group became the Women's Information Network (WIN). It formed clinics in Dublin, which mainly provided information about the identity, location, and contact details of British providers, but in certain circumstances, the Irish clinics also made abortion appointments for women.[119]

The anti-abortion lobby responded to the clinics' attempts to help women go abroad by initiating legal proceedings against two clinics.[120] Claiming a breach of the 8th amendment, the Irish Attorney General (a different one to the AG who had warned about the risks to women's lives inherent in the amendment) took the case on behalf of the Society for Protection of the Unborn Child ("SPUC") and sought an injunction to prohibit the named clinics from providing women with information about abortion services abroad. In *Attorney General (SPUC (Ireland) Ltd.) v. Open Door Counselling Ltd. and the Dublin Well Woman Centre Ltd,*[121] the Attorney General argued that, by providing information and logistical support for abortions abroad, the clinics were "assisting in the destruction of unborn life," in violation of the 8th amendment.[122] He added that the counseling activities amounted to "a conspiracy to corrupt public morals" under common law and were therefore criminal.[123]

The clinics defended their activities, claiming that under European Community law (as it was then known)[124] individuals in Ireland had a right to travel to another Member state for commercial services, and therefore the clinics were entitled to provide information about these services. An injunction, they argued, would also violate their constitutional right to freedom of expression.[125]

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[118] Sandra McEvoy, *supra* note 10.
[119] SPUC [1988] IR 593 (H. Ct.) (Ir.).
[120] Soc'y for Protection of Unborn Children Ir. Ltd. (SPUC) v. Open Door Counselling Ltd., [1988] IR 593 (H. Ct.) (Ir.); SPUC v. Open Door Counselling Ltd., [1989] IR 618 (SC) (Ir.) (affirming the High Court's ruling).
[121] The action, instituted by SPUC, was converted into action by the Attorney General with SPUC as a relator on September 24, 1986, thus allowing the Attorney General to prosecute the case. *Id.* 602-03.
[122] SPUC, [1988] IR 593 (H. Ct.) (Ir.), at 600.
[123] *Id.*
[124] Before the 1992 Treaty on European Union, February 7, 1992, OJ 1993, C224/I [Maastricht Treaty], what is now known as the European Union (EU) was known as the European Community. European Community law takes precedence over all national law, including constitutional law. The European Court of Justice ensures that European Community law is enforced.
[125] Article 40.6.1 (i) of the Constitution includes, subject to public order and morality, "the right of the citizens to express freely their convictions and opinions."

The High Court did not find that the clinics were engaged in "criminal conspiracy," but it issued an injunction against the clinics, finding that their activities unlawful under the 8th.[126] The clinics' activities, the Chief Justice stated, were within the Irish State, and thus questions of European Community law did not arise.[127]

On appeal, the Supreme Court upheld the decision,[128] on the basis that the right to freedom of expression was secondary to the unborn fetus's right to life.[129] In doing so, the Supreme Court suggested that the State's duty to protect the right to life of the unborn went beyond an abortion ban; it placed an *affirmative* duty on the State to vindicate the right to life of the unborn. One such proactive measure was to prevent the distribution of information in Ireland about the availability of abortions in other countries.

Soon after its defeat in the Irish Supreme Court, one of the clinics, Open Door Counselling, filed an action in the European Court of Human Rights (ECtHR). The ECtHR case languished until 1992, a delay common for ECtHR cases at the time. Awaiting a hearing, the pregnancy centers complied, for the most part, with the injunction. In a pre-google world, the injunction meant that clinics were prohibited from giving pregnant women the names, addresses, and telephone numbers of abortion clinics abroad.[130] Fearful of litigation, many clinics shut their doors altogether.[131] Social workers and other professionals were warned that they could be subject to legal action if they provided any form of abortion counseling.[132] Bookshops, libraries, magazines, and newsagents practiced self-censorship and removed material that carried information about British abortion clinics.[133]

2. *S.P.U.C. v. Coogan & SPUC v. Stephen Grogan*

In response to the curtailing of clinic activity, Students' Unions Ireland attempted to fill the information gap, publishing the phone numbers and addresses of English abortion clinics in their student handbooks. The SPUC

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[126] *Id.* 614.
[127] Open Door, [1988] I.R. 618 (Jr. S.C.) at 625.
[128] SPUC v. Open Door Counselling Ltd., [1989] IR 618 (SC) (Ir.). at 626.
[129] *Id.*
[130] An underground helpline run by the Women's Information Network (WIN) was established and linked up with the London-based Irish Women's Abortion Support Group (IWASG) to provide women with information and practical help. Other underground groups in Ireland also provided information through informal networks. *See e.g.*, Ivana Bacik, *Abortion and the Law in Ireland* in THE ABORTION PAPERS IRELAND: VOLUME 2, 104,108 (Aideen Quility ed., 2015); *see also*, ANN ROSSITER, IRELAND'S HIDDEN DIASPORA: THE 'ABORTION TRAIL' AND THE MAKING OF A LONDON-IRISH UNDERGROUND, 1980-2000 93-103 (2009).
[131] In response, Ruth Riddick, the director of Open Door Counselling, decided to close her counseling center "for fear of her clients suffering legal repercussions in a climate of cuddly fetus propaganda and moral hysteria." *See, e.g.,* Lesley White, *A Woman With a Cause Fights Off Old Ireland*, SUNDAY TIMES, November 1, 1992.
[132] *See, e.g.,* Anna Eggert & Bill Rolston, Ireland, in ABORTION IN THE NEW EUROPE 157, 166-68 (Anna Eggert & Bill Rolston eds., 1994).
[133] LISA SMYTH, ABORTION AND NATION, 11. The pregnancy advisory sections of imported publications as Cosmopolitan and Elle were blacked out, and British telephone directories were withdrawn from Irish libraries because they listed the numbers of termination clinics in Britain. SCHWEPPE, THE UNBORN CHILD, 29.

responded quickly. In *SPUC v. Coogan*[134]SPUC sought an injunction against the students to prevent the printing, publishing, or distributing of the Welfare Guide UCD (University College Dublin). The High Court refused this application due to lack of standing, but on appeal, the Supreme Court ruled that the importance of the societal right SPUC was trying to protect and recognized that the organization had sufficient standing to sue.[135] SPUC used this standing to return to the High Court and add two more student unions to the proposed injunction in *SPUC v. Grogan*.[136]

SPUC contended that publishing information about abortion clinics was essentially the same as the abortion counseling the Irish Courts had already prohibited; and that imparting such information violated the right to life of the unborn child.[137] They repeated the argument that the right to life of the unborn was primary and that the students' calls for the Court to uphold their right to freedom of expression could not trump the right to life.[138] The defendants argued that, under European Community law, the free supply of services within the community meant that they were entitled to publish and distribute information about abortion services abroad and that pregnant women had a right to receive information about the same.[139] The students also argued that the information they were providing was readily available elsewhere, such as British telephone books, and therefore an injunction was an ineffective means of 'vindicating the right to life of the unborn. Turning to women's rights, the students argued that, owing to the potential for complications in pregnancy, a woman's right to bodily integrity required the accessibility of basic information about terminating a pregnancy.[140] In response, SPUC maintained that the provision of abortion could not be regarded as being a 'service' because it involved the destruction of the life of a human being (the "unborn child"). They argued that women's rights to bodily integrity could not take precedence over the right to life of the unborn.[141]

Before deciding on whether to grant injunctive relief, the sole woman judge on the High Court, Justice Carroll, referred two questions to the European Court of Justice (ECJ) in Luxembourg for a 'preliminary ruling' as follows.[142]: (1) whether abortion was a "service" within the meaning of the

[134] S.P.U.C. v. Coogan, [1989] ILRM 526 (H.Ct.), rev'd, [1990] ILRM 70 (S.C.).
[135] S.P.U.C. v. Coogan, [1989] ILRM 526 1990 [ILRM] 70 (S.C.).
[136] SPUC v. Stephen Grogan, [1989] IR 753 (H.Ct.), rev'd, [1989] IR 760 (SC), aff'd, remanded, [1992] ILRM 461 (Case C-159/90, EJC), aff'd slip op. (H. Ct. August 7, 1992).
[137] SPUC v. Stephen Grogan, [1989] IR 753 (H.Ct.).
[138] *Id.*
[139] SPUC v. Stephen Grogan, [1989] IR 753 (H.Ct.) 692-93.
[140] Alan Murdoch, *Students Defend Right to Abortion Information*, THE INDEPENDENT, August 7, 1992, at 6.
[141] *Id.*
[142] A preliminary ruling is a decision of the European Court of Justice (ECJ) on the interpretation of European Union law, made at the request of a court or tribunal of a European Union member state. Article 267 of the Treaty on the Functioning of the European Union (TFEU), formerly Article 117 of the EEC Treaty Establishing the European Community. Article 177 stated that: The Court of Justice shall be competent to make a

Treaty of Rome Article 60[143] and; (2) whether Article 59's prohibition on restricting the freedom to supply services meant that the student groups had a right to distribute information about abortion services in other Member states.[144] SPUC appealed to the Supreme Court, which found in their favor and issued an injunction against the students.[145] The Supreme Court's decision asserted that there could not be any right in European Community Law that would allow travel for services that placed the right to life of the "unborn" at risk.[146] Nevertheless, the Supreme Court had no power to stop Justice Carroll's referral to the European Court of Justice for a preliminary ruling.

The students, despite the injunction and threat of prosecution for contempt of court, continued to distribute information.[147]

In October 1991, the European Court of Justice agreed with the applicants that abortion, as a medical activity provided for remuneration, is a "service" under Article 60 of the Treaty of Rome and noted that Article 59 of the Treaty of Rome prohibits restrictions on the receipt of services.[148] Nevertheless, the students were ultimately unsuccessful. The Court held that an injunction against the students did not amount to restricting the freedom to supply services under European Community Law because the students had no direct links with the service providers.[149]

The case, *SPUC v. Grogan,* returned to the Irish High Court. This time around, the High Court instituted a permanent injunction preventing the students from disseminating information about international abortion services.[150] Moreover, the Court passed case papers to the Director of Public Prosecutions for possible criminal contempt proceedings against students who had breached the earlier temporary injunction.[151] The students promised to continue providing the information about pregnancy advisory services in the

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preliminary decision concerning (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community; and (c) the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide.

[143] Article 60, addressing the meaning of "services," states: Services within the meaning of this Treaty shall be deemed to be services normally supplied for remuneration, to the extent that they are not governed by the provisions relating to the free movement of goods, capital, and persons.
Services shall include in particular:
(a) activities of an industrial character;
(b) activities of a commercial character;
(c) artisan activities; and
(d) activities of the liberal professions. *See* Treaty Establishing the European Community, March 25, 1957, 298 UNTS 11, art. 60.

[144] SPUC v Grogan, [1989] IR 753 (H.Ct.).

[145] S.P.U.C. v Grogan [1989] IR 760 (S.C.).

[146] *Id*. at 765.

[147] THE ABORTION PAPERS IRELAND, 16; *See* EMILY O'REILLY, MASTERMINDS OF THE RIGHT 132-33 (1992).

[148] SPUC v. Grogan, [1991] ECR 4685.

[149] *Id*.

[150] SPUC v Grogan, [1989] IR 753 (H.Ct.).

[151] Alan Murdoch, *Fresh Ban on Abortion Information in Ireland*, THE INDEPENDENT, August 8, 1992, at 3.

UK, stating that they were prepared to risk jail.[152]

Though the ECJ had upheld the ban on the students' provision of abortion information, the outcome of the case provoked concern amongst members of the anti-abortion lobby. The Irish Family Planning Association (IFPA) established a direct commercial link with the British Pregnancy Advisory Service (BPAS) – an abortion provider in the UK – whereby the IFPA referred abortion-seeking women for BPAS's services. Because the IFPA was now providing 'customers' to a European service provider, Ireland could not prohibit the IFPA's abortion counseling. Now deeply suspicious of European law, the anti-abortion lobby grew concerned about the impending Maastricht Treaty to create the European Union (EU). The goal of the Treaty was the creation of an economic, monetary, and political union among Member States of the EU, but anti-abortion campaigners were adamant that the 8th amendment needed to be legally insulated from any changes in the interplay between Irish law and European Union law. Anti-abortion groups mobilized quietly and successfully to convince the government to negotiate a protocol to the Treaty that would protect the 8th amendment from any future impact of European Union law.[153] Protocol 17 read:

> Nothing in the Treaty on European Union, or the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland.[154]

3. *The Attorney General v. X and Others*

Despite another apparent victory for the Irish anti-abortion lobby, an event in February 1992 posed the biggest threat yet to their persistent legal and political campaign to maintain the State's abortion ban. In what became known as the *X case*[155] the public erupted upon hearing that the State attempted to stop a fourteen-year-old girl, who had been raped by her best friend's father, from traveling with her parents to London for an abortion. Before setting out on their journey, the teenager's parents asked the Gardaí (police) if they should preserve a tissue sample to assist with the alleged rapist's prosecution. The Gardaí, unsure whether a DNA test would be admissible as evidence in Court, referred this question to the Director of Public Prosecutions, who in turn alerted the Attorney General. The Attorney General, assuming the role as the protector of the right to life of the unborn

[152] Interview with Prof. Ivava Bacik, July 2016, who was one of the students against whom the injunction was taken; *See also*, Jeffrey Weinstein, *An Irish Solution to an Irish Problem": Ireland's Struggle with Abortion Law*, 10 ARIZ. J. INT'L COMP. L. 165 (1993).
[153] Brian Dowling, *Legal look at Protocol to Treaty*, IRISH INDEPENDENT, February 20, 1992.
[154] Treaty on European Union, Protocol 17, February 7, 1992, OJ (C 325/5).
[155] Att'y Gen. v. X and Others, [1992] 1 IR 1 (H. Ct.) (Ir.) [hereinafter, *Att'y Gen. v. X*].

as per the 8th, then sought – and was granted – an injunction from the High Court to stop the pregnant girl and her parents from traveling abroad for nine months.[156]

Known as "Miss X," the girl and her family returned to Ireland upon hearing of the injunction. But her case had already sparked mass public outcry.[157] At a march organized by the Dublin Abortion Information Campaign ("DAIC"), 10,000 people chanted for "a woman's right to choose." [158] It was only a decade before that a majority of the electorate voted for an outright abortion ban, but for many, compelling a fourteen-year-old to maintain a pregnancy conceived through rape was too much to stomach.[159] The Irish Independent (a newspaper known for supporting the government) included an editorial that described the State as having "created a prison" in which X and her family had to suffer "for being the entirely innocent victims of sexual violence of the worst kind."[160] Jon O'Brien of the Irish Family Planning Association told international media that "the state appears more concerned with protecting the procreative rights of rapists than with protecting the rights of their victims."[161] News outlets around the world commented on Ireland's tyrannical approach to a teenager in distress.[162] So intense was the criticism that the government pleaded with X's parents, who at this point did not want any further trauma or attention, to appeal the case to the Irish Supreme Court.[163] Eventually, the family agreed to appeal, and the State footed the bill.

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[156] The Court rejected the defendant's four arguments opposing the injunction. Firstly, the High Court dismissed the jurisdictional argument advanced, that because the Oireachtas had not regulated how the right to life of the unborn and the right to life of the mother referred to in the 8th amendment could be reconciled, the Court could make no order in a case in which an issue of reconciliation arose. Secondly, the Court rejected the argument that because of the possibility of suicide, the Court would not be affording due regard to the right to life of the girl if it upheld the order. The Court reasoned that the risk that X might take her own life if not allowed to travel for an abortion was less and different in order of magnitude than the otherwise certain death of the unborn if the order was not made. Thirdly, the Court determined that the defendants' contentions that the girl's right to liberty was being unlawfully infringed were unfounded since the Court had the power to restrain the abuse of a constitutional right when exercised to commit a wrong. And finally, the Court rejected the defendant's argument that, as a matter of European Community law, the defendants had a *prima facie* right to travel to another Member State to receive a medical service. A.G. v X, at 11-16. On the EU question, the Court contended that Ireland's derogation from EC law on the freedom to travel for services (Articles 59 and 60 of the Treaty) would be permissible under EC law in this case on grounds that the divergence was based on Ireland's deeply held convictions on moral issues. *Id* at 16. The High Court also asserted that the European Convention of Human Rights did not bear on the issue.

[157] *See, e.g.,* Alan O' Keefe, *Nationwide Drive to Back Girl* THE IRISH INDEPENDENT, February 20, 1992, at 7. *See generally,* Mary Muldowney, *Breaking the Silence: Pro-choice Activism in Ireland Since 1983*, in SEXUAL POLITICS IN MODERN IRELAND 127, 134 (Sandra McAvoy & Mary McAuliffe eds., 2015).

[158] *See, e.g.,* IVANA BACIK, THE IRISH CONSTITUTION AND GENDER POLITICS 387 (2013) (describing how the rock star Sineád O' Connor flew in from the United States, "came out" about two abortions, and stormed the Dáil refusing to leave until she had confronted the country's newly appointed Taoiseach, Albert Reynolds.).

[159] *See, e.g.,* LISA SMYTH, ABORTION AND NATION 11 (2005).

[160] Irish Independent, Editorial, IRISH INDEPENDENT, February 19, 1992, at 10.

[161] *Irish Court denies abortion to rape victim, 14,* STAR TRIB. MINNEAPOLIS, February 18, 1992.

[162] *See, e.g.,* James Clarity, *Irish Court says girl can leave to obtain an abortion in Britain Girl* NY TIMES (FebRUARY 27, 1992), https://www.nytimes.com/1992/02/27/world/irish-court-says-girl-can-leave-to-obtain-abortion-in-britain.html.

[163] *See, e.g.,* EMILY O'REILLY, MASTERMINDS OF THE RIGHT 133 (1997).

Within ten days, the Supreme Court reversed the injunction. On appeal, X's legal team argued that a 14-year-old girl, pregnant as a result of rape, faced a real and substantial risk to her life due to the threat of suicide and that termination of her pregnancy was legal under the 8th amendment. The Supreme Court agreed. In attempting a reconciliation of the rights of the "mother" and "the unborn," the four majority judges agreed that if the termination was necessary to keep a woman alive, abortion was permissible under the 8th amendment. In the words of Finlay CJ:

> the proper test to be applied is that if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health of the mother, which can only be avoided by the termination of her pregnancy, that such termination is permissible, having regard to the true interpretation of Article 40.3.3 of the Constitution. [164]

A majority of the Court accepted evidence provided by a clinical psychologist that the girl was suicidal, and they determined that this amounted to a "real and substantial" threat to her life that could only be alleviated by ending her pregnancy.[165] However, the Court did not provide any further guidance on other circumstances that might satisfy the test. Rather, the judges made clear that they felt less than comfortable to be in the "abortion umpiring business."[166] The amendment, "born of public disquiet, historically divisive of our people," was, the Supreme Court said, "bare of legislative direction."[167] Their ire was evident in the reprimand delivered to the Irish legislature by one of the judges (McCarthy J):

> the failure by the legislature to enact the appropriate legislation is no longer just unfortunate; it is inexcusable. What are pregnant women to do? What are the parents of a pregnant girl underage to do? What are doctors to do?[168]

By the time the Irish Supreme Court issued its opinion to lift the High Court injunction that February, X had miscarried.[169]

Though pro-choice groups welcomed the Supreme Court's move to lift the injunction, some also criticized the limits of the decision. The feeling was

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[164] Att'y Gen. v. X [1992] 1 IR 1, 57–58.
[165] *Id.*
[166] *Planned Parenthood v. Casey*, 505 US 833, 4842 (1992) (Opinion of J. Scalia).
[167] Att'y Gen. v. X, at 92.
[168] *Id.*
[169] Ruadhán Mac Cormaic, *X Case Judge Says Ruling is 'Moot' in Current Abortion Debate*, IR. TIMES (July 6, 2013).

that the Court's interpretation of the 8th was too narrow and still prioritized the "unborn." Feminist commentators and activists noted that the State's obligation to protect fetal life under the 8th amendment extended only "as far as practicable," but the Supreme Court in *X* interpreted this to mean that if a fetus' life was at risk, any burden short of mortality could be imposed upon pregnant women.[170] Endangering a woman's health or imposing economic or emotional suffering did not make state interventions impracticable.[171] As one journalist emphasized in the days following the decision, the ruling changed little for Irish women; "this week, at least 100 women will travel to England for abortions."[172]

Anti-abortion campaigners were also unhappy with the Court's decision in *X*.[173] Arguing that permitting abortion in situations when a woman was at risk of suicide subverted the intent of the 1983 referendum, they lobbied the government to hold another referendum to overturn the decision. The solution in such cases, anti-choice activists claimed, would be to "mind" pregnant women who were suicidal,[174] so that the pregnancy could be carried to term. Within a couple of months, anti-choice lobbying bore success, and the government committed to run an abortion referendum to eliminate suicide risk as a legal basis for a life-saving abortion.

4. *Open Door Counselling Limited v. Ireland*

Before the Government managed to put another abortion referendum to the people, the European Court of Human Rights (ECtHR) took up the question of whether the Irish Supreme Court's 1988 injunction against the provision of abortion-relation information by pregnancy counselling centers was in keeping with the European Convention on Human Rights. Two years prior, having exhausted their domestic remedies, the clinics had lodged an appeal before the ECHR supervisory bodies, arguing that the Irish ban unduly limited their freedom of expression. At that time, cases brought for alleged violations of the ECHR were first examined by the European Commission on Human Rights,[175] which declared the case admissible and

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[170] *See, e.g.,* Emily O'Reilly, *One Step Forward and Two Steps Back,* IR. PRESS, March 6, 1992, at 6; ABORTION PAPERS IRELAND (Ailbhe Smyth ed., 1993).

[171] *See, e.g.,* Marie Fox and Therese Murphy, *Irish Abortion: Seeking Refuge in a Jurisprudence of Doubt and Delegation* 19(4) J. OF L. & SOC'Y 454 (1992).

[172] Mary Holland, IR. TIMES, February 19, 1992; *See*, EMILY O'REILLY, MASTERMINDS OF THE RIGHT 132-33 (1992).

[173] *See, e.g.,* William Binchy, *New Abortion Regime has no Effective Limits,* THE IR. TIMES, March 6, 1992, at 13; Mary Tynan, *Campaign to Amend the Constitution Launched,* THE IR. TIMES March 11, 1992, at 3; Billy Gilhealy, *The State and the Discursive Construction of Abortion, in* GENDER, POLITICS AND THE STATE 58, 74-75 (Vicky Randall and Georgina Waylen eds., 1998).

[174] *Id.*

[175] Until the enactment of the 11th additional Protocol to the Eur. Conv. on H.R. in 1998, applications were first examined by the Eur. Comm'n on H. R., a political body which sought to achieve a friendly settlement of the dispute and issued a decision. Decisions by the Eur. Comm'n on H. R. could then be appealed to the Eur. Ct. H.R.

made a preliminary decision that the law violated Article 10 of the Convention, protecting freedom of speech.[176] The State appealed the Commission's decision to the European Court of Human Rights, which heard the case two years later in September 1992.

In *Open Door Counselling Limited and Dublin Well-Woman Centre Limited v. Ireland*, the counseling centers, now joined by applicants Bonnie Maher and Ann Downes (who worked as counselors for Dublin Well Woman) along with two individual women, Mrs. X and Ms. Maeve Geraghty, who joined as women of child-bearing age, argued that the Supreme Court's injunction prohibiting the clinics from distributing information about abortion clinics abroad was contrary to Article 10 of the European Convention of Human Rights (the right to freedom of expression);[177] the clinics and counsellors could not impart information, and Mrs. X and Ms. Geraghty could not receive information.[178] They added that the injunction discriminated against the applicants on grounds of political or other opinion under Article 14 of the Convention since those who sought to counsel against abortion were permitted to express their views without restriction.[179] Finally, the clinics raised the fundamental issue, namely, abortion's illegality in Ireland which they claimed violated the European Convention; women, they argued, have a right to abortion under article 8 of the Convention, which guarantees the "right to respect for . . . private and family life."[180]

The State successfully argued that Ireland's prohibition on abortion information fell within the scope of permissible restrictions on the right to freedom of expression in the European Convention; the restriction was "prescribed by law" and was "necessary in a democratic society" under one of the grounds specified in Article 10 namely, "the protection of public morals." The Court accepted that Ireland had a legitimate aim in adopting the injunction because the protection of the "unborn child" was predicated on the Irish community's "profound moral values concerning the nature of life," as reflected in the 1983 referendum. The Court also acknowledged that, in general, the Convention affords Member States a wide margin of discretion on questions involving the protection of morals within their respective communities.[181]

Nevertheless, the Court agreed with the *applicants* that the injunction against the clinics was "overbroad and disproportionate" and therefore fell afoul of the Convention's protections for freedom of expression.[182] The Court

[176] Open Door Counselling v. Ir., App. No. 14234/88 & 14235/88, Eur. Ct. H.R. (1990).
[177] Open Door Counselling v. Ir., 15 Eur.H.R.Rep. 244 (1992).
[178] *Id.* 53, 62, 81.
[179] *Id.* 81, 82.
[180] *Id.* 3 2.
[181] *Id.*63.
[182] *Id.* 74.

held that the injunction was disproportionate to Ireland's legitimate aim of protecting the unborn because it appeared to be largely ineffective—it did not prevent the large numbers of Irish women from continuing to obtain abortions in Britain.[183] In the Court's view, the injunction might delay many women—possibly risking the health of such women by causing them to have later abortions—but it did not stop the abortion trail. Noting that the clinics served many women who faced both educational and socio-economic barriers to accessing information, the Court commented that the injunction was likely to have adverse effects on women who were already disadvantaged.[184] The injunction was doing little to implement the 8th amendment; rather, it was making it more difficult for women to have the safest type of abortion (first trimester) and reinforced the socio-economic vulnerabilities of women who did not have access to information elsewhere.

The Court avoided considering the compatibility of Ireland's constitutional ban on abortion with the Convention, but for the advocates, it was a win. [185] Moreover, for the first time in the litany of abortion cases since the 1983 referendum, a judicial decision took seriously the impact of the information ban on women.

D. The 1992 Referendum

In November 1992, just one month after the *Open Door* ruling, the Government presented three abortion-related constitutional amendments to the Irish people. First, the 12th Amendment of the Constitution Bill responded to anti-choice calls to subvert the X-case decision by excluding the risk of suicide as a legal ground for a life-saving abortion. The 12th amendment read:

> It shall be unlawful to terminate the life of an unborn unless such termination is necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to a real and substantial risk to her life, not being a risk of self-destruction.

Second, the uproar over the confinement of *X* suggested to the Government that the public likely would vote against restrictions on the right of women to travel abroad for abortions. Accordingly, the Government proposed the 13th Amendment, which specified that the 8th amendment

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[183] *Id.* 76.
[184] *Id.* 77.
[185] *See, e.g.,* Chris Ryder, *Irish Advice Ban on Abortion Ruled a Breach of Rights; Women's Groups Welcome Strasbourg Verdict That Injunction Against Information on Ending Pregnancies is 'Over-Broad,'* DAILY TELEGRAPH, (October 30, 1992).

would not limit "freedom to travel between the State and another state."[186] Finally, the proposed 14th Amendment reaffirmed the right to freedom of information: "This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state."

In part, because they were no longer a united front, anti-choice activists were unable to match the intensity and ferocity of their 1983 campaign in their 1992 referenda campaign. Some anti-choice groups wanted to campaign for a 'No' vote in all three referenda. The Pro-Life Campaign, for example, was unhappy with the text of the 12th Amendment and its recognition that abortion could be legally permitted to save a woman's life. A life-saving abortion was a misnomer to their minds. Rather than just giving the Irish people the opportunity to remove the threat of suicide as a ground for legal abortion, the Pro-Life Campaign wanted the amendment to ban abortion even where there was a "real and substantive risk to the life of the woman" (the X-case test).[187] Of the same mind, Youth Defense circulated leaflets that claimed: "the government is asking us to legalize the killing of little babies."[188] By contrast, others, including the majority of Ireland's Catholic bishops, were agreeable to allowing a 'Yes' vote on the travel and information amendments; they calculated that efforts to constrain these freedoms could end up leading to more liberal concessions on abortion restrictions down the road.[189] The Catholic hierarchy understood that women "going to England" or "getting the boat" – the euphemisms used for abortion travel – provided a safety valve that allowed the country to ostensibly maintain an image of Ireland as a "pro-life" nation.

Pro-choice groups also struggled to form a united coalition in the run-up to the 1992 referendum. Following *X*, one group, the Dublin Abortion Information Campaign (D.A.I.C.), adopted an explicitly pro-choice position, but broader efforts to establish a "Repeal the Eighth Amendment Campaign" ("R.E.A.C.") led to less defiant messaging. R.E.A.C. campaigned for fewer restrictions on accessing information about abortion, legislation on X (i.e., legislation specifying the right to an abortion in the case of suicide), and the right to travel, rather than more liberal pro-choice policies.[190] As in the 1983

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[186] Referendum (Amendment) (Act no. 2/1992), HTTP://www.irishstatutebook.i.e.,/Eli/1992/act/22/enacted/en/HTML (The amendment reads "[t]his subsection shall not limit freedom to travel between the State and another state.").

[187] *See, e.g.,* Pro-Life Campaign, *Valuing All Human Life,* https://prolifecampaign.ie/main/wp-content/uploads/2011/08/Pro-Life-Campaign-Submission-to-the-All-Party-Oireachtas-Committee-on-Abortion-Valuing-All-Human-Life-1999.pdf (Submission of the Pro-Life Campaign to the All-Party Oireachtas Committee on the Constitution); *See also* Brian Girvan, *Moral Politics and the Irish Abortion Referendums 1992* 47(2) PARLIAMENTARY AFF. 203 (1994).

[188] Leaflet issued by Youth Defense Pro-Life Campaign (1992).

[189] *See, e.g.,* Brian Girvan, *Moral Politics and the Irish Abortion Referendums 1992* 47(2) PARLIAMENTARY AFF. 203 (1994).

[190] Aileen O'Carroll, *Anti-abortionists told to SPUC OFF!*, WORKERS SOLIDARITY (1993) http://struggle.ws/ws93/abortion38.html [hereinafter O' Carroll, *SPUC OFF*].

campaign, pro-choice arguments were tame, but this time around, the anti-amendment campaign openly discussed the impacts of the proposed amendment on women. One of their key arguments, for example, was that the distinction between the mother's life and the mother's health was unclear.[191] Highlighting that a woman whose health might be threatened by illness but whose life might not be immediately threatened would not be allowed an abortion, pro-choice activists interrogated the entirely of the 12th amendment, not just the attempt to exclude suicidal risks.[192] In another difference from 1983, the medics and the women's groups were on the same side; several doctors who agreed with R.E.A.C.'s argument about the unworkability of the life and health distinction – and also opposed the information restrictions – formed a Doctors for Information group. But shared referendum goals aside, Doctors for Information would not appear publicly with pro-choice women's groups.[193]

By a ratio of approximately two to one, the public voted against the 12th Amendment and its proposition to exclusion of suicide risk from the life-threatening risks that could permit an abortion. The information and travel amendments passed by a similar margin.[194] Thus, as of 1992, the Irish Constitution contained a three-part provision relating to abortion: a statement on the constitutionally protected right to life of "the unborn" to be protected and vindicated as far as practicable and with due regard to the equal right to life of the pregnant woman; a statement that the unborn's right to life did not limit women's freedom to travel abroad; and a statement that women's freedom of information was not legally restricted by the 8th.

Though prior to the results 1992 referendum, the Minister of Health, John O'Connell, had committed the Government to legislate on *X* if the suicide proposition was defeated,[195] no such action was taken. Three years later, in 1995, the Government passed the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Act,[196] to give effect to the information amendment. Most of the Act, however, concerned prohibitions on the dissemination of information about abortion services rather than affirmatively protect the rights to information and expression.[197]

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[191] *Id.*
[192] David Cole, *"Going to England": Irish Abortion Law and the. European Communit*y, 17 HASTINGS INT'L & COMP. L. REV. 113, 114 (1993).
[193] O' Carroll, *SPUC OFF*, *supra* note 177.
[194] Referendum Results, DEP'T OF HOUSING, PLAN. AND LOC. GOV'T, https://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/LocalGovernment/Voting/referendum_results_1937-2015.pdf at 47.
[195] Vincent Brown, *Legislation on Abortion, not just funking, is required*, IR. TIMES (February 22, 2012), https://www.irishtimes.com/opinion/legislation-on-abortion-not-just-funking-is-required-1.468061.
[196] Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995 (Act No. 5/1995), http://www.irishstatutebook.ie/eli/1995/act/5/enacted/en/html.
[197] Even the official government guidance on the Act is clear that the objective was not the protection of the right to information, but rather "to limit circumstances in which women seek to have abortions." DEP'T OF HEALTH,

The Act made it unlawful, for example, for anyone to give information that would "encourage or advocate an abortion in individual circumstances."[198] This prohibition came with the threat of summary conviction, but nothing in the Act defined what "encourage" and "advocate" meant.

In practice, the Information Act had a chilling effect on healthcare providers and women. At the most basic level, women were unaware of their right to information and consequently were fearful to ask direct questions or to reveal medical information to their medical carers.[199] Doctors, nurses, midwives, sonographers, and other healthcare workers consistently reported that law restrained the type of care they could offer their patients; they felt unable to inform their patients on options for ending pregnancy, including options abroad, in case this could be construed as "advocating" Abortion under the Act.[200] While, in fact, the wording of the Act allowed for the provision of 'truthful and objective' information, the chilling effect of this law was such that many misread it as prohibiting the provision of even basic information.

Despite the escalating restrictions on abortion access, Irish women continued to terminate their pregnancies, covertly and abroad, the country's "hidden diaspora."[201] But just as the law's imprecision impeded the right to information on abortion, the absence of clarifying legislation inhibited the freedom to travel for an abortion. A case in point was a 1997 High Court decision involving a 13-year-old in state care. Known as "C," the girl, who became pregnant following rape, expressed to her carers that she would end her life if forced to give birth.[202] The public health board, which was responsible for her care, obtained a court order to enable the board to take her abroad for an abortion. Upon hearing about the intended abortion, the anti-abortion organization Youth Defence encouraged the girl's father to challenge his daughter's wishes and to contest the health board's petition in the High Court.[203] In what was known as "the C case," the High Court determined that the health board was permitted to take C to England for an

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Guide to the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill, Feb.1995.

[198] Regulation of Information (Services Outside the State for Termination of Pregnancies) Act, 1995, (Act No. 5/1995), § 5.

[199] *See, e.g.*, LINDSEY EARNER-BYRNE, THE IRISH ABORTION JOURNEY, 1920–2018 (2019).

[200] *See, e.g.,* Dearbhail McDonald, *Doctors Fear Abortion Charge If They Direct Patients Abroad* IRISH INDEPENDENT (December 12, 2009) (This remains an issue post repeal of the 8th amendment); *See also,* Kitty Holland, *Coombe Letter Refusing Abortion 'Suggests Chilling Effect' of Law*, IR. TIMES (January 19, 2019), https://www.irishtimes.com/news/social-affairs/coombe-letter-refusing-abortion-suggests-chilling-effect-of-law-1.3763143.

[201] William Johnston, *Historical Abortion Statistics, Ireland*, http://www.johnstonsarchive.net/policy/abortion/ab-ireland.html (last updated August 17, 2019) (noting that in 1990, 4064 Irish women had abortions in Britain; in 2001, the figure was 6673).

[202] A and B v. E. Health Bd., J. Mary Fahy and C, and the Att'y Gen. [1998] 1 ILRM 460 (H. Ct.) [hereinafter, *C v Atty Gen*].

[203] *See, e.g.*, Ruth Fletcher, *Pro-Life' Absolutes, Feminist Challenges: The Fundamentalist Narrative of Irish Abortion Law 1986-1992*, 36(1) OSGOODE HALL L. J. 62 (1996).

abortion because, as in the X Case, the girl was suicidal and therefore "a real and substantial risk to her life" existed if the pregnancy were to continue.[204] Although the case did not directly implicate the travel amendment, Justice Geoghegan, writing for the court, addressed it by claiming that the 13th amendment had not, in fact, recognized a substantive right to travel for an abortion.[205] "I do not think [the amendment] was ever intended to give some new substantial right," he contended. Rather, "it was intended to prevent injunctions against travel or having an abortion abroad."[206] On Justice Geoghan's reading, the state could *only* authorize travel for an abortion if the requirements set out in *Attorney General v. X* were satisfied, i.e., where a "real and substantial risk" to a woman's life existed.[207] But this contradicted the popular understanding of the travel amendment. The Department of Justice, for example, had legally permitted asylum seekers to travel for abortions and then to return to Ireland without any assessment of risk to life. *C's* case questioned the legality of this practice and the abortion travel of thousands of others.

E. The 2002 Referendum & Women on Waves

In 2002, the government proposed yet another constitutional amendment on abortion: the 25th Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, No.48 (2001). Presented as measures to deal with "crisis pregnancy,"[208] the amendment had four main parts: (1) to ensure that life was protected from the moment of implantation (as opposed to conception), (2) to require the Oireachtas to pass within 180 days of the referendum its proposed Protection of Human Life in Pregnancy Act 2002 (which among other provisions clarified that traveling abroad for an abortion was not a criminal offense)[209] (3) to grant the proposed Act constitutional protection so that, in the future, it could only be amended by referendum of the People, and (4) to permit abortion when it was necessary to prevent loss of the pregnant woman's life except when the threat to her life was a risk of

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[204] *C v Att'y Gen*, *supra* note 20, p 478
[205] *Id.* 483.
[206] *Id.*
[207] *Id* 482.
[208] Notably, the socialist TD Joe Higgins commented that "it would be more honest if the Taoiseach presented each woman with a crisis pregnancy with a map of England, and, perhaps, a ferry ticket, because the Government did not want to know anything about them and preferred to shut their eyes to their predicament." Michael O'Regan, *Taoiseach Says Abortion Poll Has No European Dimension*, THE IR. TIMES, (Oct.10, 2001), https://www.irishtimes.com/news/politics/oireachtas/taoiseach-says-abortion-poll-has-no-european-dimension-1.331372.
[209] Twenty-Fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) (Bill No.48/2001) (Section 4 of the Bill accompanying the amendment provided that "this Act does not operate to restrict any person from travelling to another state on the ground that his or her intended conduct there would if it occurred in this State, constitute an offence under Section 2 of this Act.")

suicide (i.e., to undo this element of the X Case). Penalties for procuring an abortion also increased under the amendment.

This time, the Fianna Fáil Government had been persuaded to hold a referendum by four anti-choice independent Teachtaí Dálí (TDs) whose support Fianna Fáil needed to create a coalition government.[210] The TDs in question had been particularly aggravated the previous year when, at the invitation of Irish pro-choice groups, Dutch organization Women on Waves sailed a floating medical facility to Dublin and Cork to provide abortions. The ship was originally intended to provide abortion in international waters to ensure that neither woman nor provider would be criminalized. However, given that the ship had not fulfilled certain requirements in the Netherlands, the Dutch Justice Minister threatened to prosecute the medical professionals on the ship if surgical or medical abortions were performed.[211] Instead, the Women on Waves team distributed contraceptives, did pregnancy tests, and provided counseling and service information to hundreds of people. News agencies from around the world covered the visit, and even at home, Irish press coverage was primarily positive.[212] And possibly concerning for anti-abortion groups, Women on Waves *Ireland*, the activists who had invited the ship publicly stated that the visit was designed "catalyze efforts to liberalize abortion laws in Ireland."[213] In response, the independent TDs, Fianna Fáil, and the anti-abortion groups decided that another referendum to strengthen the 8th amendment was the way to crush this rising wave of pro-choice activism before it gained more energy.

The government's campaign for the amendment faltered in part because the government seemed to want to have it both ways. On the one hand, it appeared to be seeking a greater degree of protection for "the unborn" by asking the public to vote for a constitutional prohibition on abortion in cases of suicide. On the other hand, in proposing an amendment to ensure that women could leave the jurisdiction to obtain abortions, arguably the state was diluting the legal duty is owed to "the unborn."

Faced with these competing concerns, anti-abortion forces split. [214] The Catholic Church and the Pro-Life Campaign lobbied for a "Yes" vote in agreement with the government's proposal to tighten Irish abortion laws.[215] Other organizations, such as Youth Defence and Mother and Child, called

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[210] *See, e.g.,* Liam Weeks *Independents in government: a case study of Ireland* (Apr. 13-18, 2004)(Paper Presentation, Uppsala Universitet), https://ecpr.eu/Filestore/PaperProposal/2d6b83fd-83dd-4953-ad01-d5bad5056d4d.pdf.
[211] *See, e.g.,* Women on Waves *Abortion ship Ireland, WOMEN ON WAVES,* https://www.womenonwaves.org/en/page/769/abortion-ship-ireland-2001.
[212] Allison M. Clifford, *Abortion in International Waters Off the Coast of Ireland: Avoiding a Collision between Irish Moral Sovereignty and the European Community*, 14 PACE INT'L L. REV. 385, 419 (2002).
[213] *Id.*
[214] *See, e.g.,* Press Release, S.P.U.C., *International Pro-life Leaders Call for a No Vote in Irish Abortion Referendum*, (February 28, 2002).
[215] *See, e.g.,* Patsy McGarry & Mark Brennock, *Bishops Support Abortion Poll Proposal*, IRISH TIMES, December 13, 2001, at 1.

for a "No" vote because the proposal defined abortion as "the intentional destruction . . . of human life after implantation in the womb of a woman,", i.e., the fetus's right to life applied only following implantation.[216] This latter view mirrored a recent Polish law and was proposed to avoid outlawing contraceptives such as Plan B and IUDs.[217] Amongst pro-choice groups, the *Alliance for a No Vote* umbrella campaign[218] focused their messaging on objecting to the elimination of the suicide exception,[219] and arguing that the referendum was fraught with ambiguities.[220] The Irish Family Planning Association attacked the abortion regime in its whole; it's chair Tony O'Brien condemned the government for lacking "the political courage to publish an amendment to the Constitution which would allow the 6500 women traveling to the U.K. each year to have their abortions at home."

When the public voted in March 2002, the referendum was defeated by 50.4% to 49%; just 10,000 votes retained access to legal abortion by women at risk of suicide.[221] Reports from this time suggest that the vote was influenced by bad weather that appeared to discourage people from visiting polling stations in rural areas – the communities that the anti-abortion lobby had pinned their hopes on.[222]

F. The European Court of Human Rights: D & ABC

Despite continuing calls from the Supreme Court that the 8th amendment needed clarification,[223] the Irish government maintained its policy of legislative inaction on the 8th. Catharine Forde, former chairperson of the Irish Family Planning Association, commented that "politicians were

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[216] Twenty-Fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill (Bill No. 48/2001), §1(1) (The Bill defined abortion as "the intentional destruction . . . of human life after implantation in the womb of a woman.").

[217] *See*, *e.g.,* Proposed Twenty-Fifth Amendment, *supra* note 112, at Second Schedule § 1(1). For commentary, *see* Fintan O' Toole, *Cruel, bleak, View of Women Put to the People*, THE IR. TIMES, March 5, 2002, at 14.

[218] The Alliance for a No Vote umbrella group included the Irish Family Planning Association; Irish Council for Civil Liberties Women's Sub-Committee; Lawyers for Choice; Cork Women's Right to Choose Group; Dublin Abortion Rights Group; Women's Education Research & Resource Centre, UCD; Pro-Choice Campaign; Socialist Party; Workers' Solidarity Movement. *See* http://struggle.ws/darg/pr/alliancenolaunchoct01.html.

[219] *See*, *e.g.,* Carol Coulter, *Legislation Proposed by Government Has Four Main Aims*, THE IR. TIMES, (February 18, 2002); Ivana Bacik, *Hypocrisy and Fear in Debate on Abortion,* THE IR. TIMES, December 24, 2001, at 14.

[220] *Id*.

[221] GOV'T OF IR., REFERENDUM RESULTS 1937-2015, 70, http://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/LocalGovernment/Voting/referendum_results_1937-2015.pdf.

[222] *See*, *e.g.,* David Sharrock, *Irish Voters Reject Change to Abortion Law*, The TELEGRAPH, (March 8, 2002), https://www.telegraph.co.uk/news/worldnews/europe/ireland/1387148/Irish-voters-reject-change-to-abortion-law.html.

[223] *See*, *e.g.,* Baby O v. Minister for Just., Equality and L. Reform, Unreported S. Ct. Judgment, [2002] IR 169 (a case involving a pregnant Nigerian woman who challenged a deportation order against her by arguing that the state's duty to defend the right to life of the unborn should include her unborn child who would be at risk if she was forced to leave Ireland and deliver in Nigeria. The Supreme Court rejected her argument but urged the government to take action to implement the 8th amendment.).

terrified of being called murderers (…) they were paralyzed with fear, so they did nothing."[224] With no legal framework to assist medics (or pregnant women) to determine what cases fell within the X-case conditions for legal abortion, medical professionals reported that they were often unable or unwilling to provide care to pregnant women, including life-saving care. The Irish Medical Council Guidelines (an ethical guide to doctors practicing in the country) explicitly excluded the threat of suicide as a ground for terminating a pregnancy.[225]

Ultimately, the law's ambiguity meant that pregnant women often needed to turn to the courts to confirm their right to access an abortion in life-threatening circumstances. Few choose this route; it is estimated that approximately 2,000 pregnant women traveled from Ireland to the UK or mainland Europe for abortions every year until 2018.[226]

Quite brazenly, the Irish Government relied on the absence of domestic legislation clarifying the 8th amendment when challenged about the law at the European Court of Human Rights. In *D. v Ireland*, the applicant argued that Ireland's ban on abortion in the case of fatal fetal abnormalities violated articles 3 (freedom from torture), 8 (right to private life) 13, 14, and 20 of the European Convention on Human Rights.[227] Upon learning that one of the twins she was carrying had died in the womb and that the other had Edward's syndrome, the woman, known as *D*, had traveled to the UK for an abortion. Despite her fatal fetal abnormality diagnosis, her doctors told her that she could not end her pregnancy under Irish law. For its part, the Government lawyers argued that it was an "open question" as to whether *D* would have been legally entitled to an abortion in Ireland should she have gone through the Irish courts system; there was no legislation on the 8th, and therefore it was 'impossible to foresee' if an abortion in her circumstances would be criminalized.[228] The state's lawyers claimed that there was at least a tenable argument that a fetus suffering from a fatal abnormality was not "an unborn" for the purposes of the 8th or that even if it was an unborn, its right to life was not actually engaged as it had no prospect of life outside the womb.[229] The European Court of Human Rights sided with the government and held that D's case was inadmissible because D did not go through the Irish courts to determine whether her situation fell within the 8th.

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[224] Interview with Catharine Forde, (July 19, 2018).
[225] IRISH MEDICAL COUNCIL, A GUIDE O ETHICAL CONDUCT AND BEHAVIOUR (1998) (the Medical Council is a regulatory body for the medical profession established by the Medical Practitioners Act, (Act No. 4/1978).
[226] Irish Family Planning Association, *Abortion in Ireland: Statistics,* IR. FAM. PLAN. ASS'N, https://www.ifpa.ie/Hot-Topics/Abortion/Statistics (The IFPA recorded that between 1983 and 2014, at least 161,987 women living in Ireland travelled to England and Wales to access abortion services. Women living in Ireland also accessed abortion services in other European countries such as the Netherlands and Spain.).
[227] D v Ir. Application, App. No.26499/02 Eur. Ct. H.R. (2006).
[228] *Id.* 69.
[229] *See, e.g.,* Carol Coulter, *Foetus May Not Always Be an Unborn, Argues State,* IR. TIMES (July 14, 2006), https://www.irishtimes.com/news/foetus-may-not-always-be-an-unborn-argues-state-1.1030072.

The state had successfully defended itself in *D v. Ireland* by claiming that Ireland likely did not ban abortion in cases of fatal fetal abnormality. Far from a settled question, a year later, news broke that state actors were trying to stop a pregnant 17-year-old girl from leaving the country to abort a pregnancy with a fetal abnormality.[230] "Miss D," who was in the care of the state, expressed her intention to travel to the UK for an abortion to her social worker, who in turn informed the Health Service Executive (HSE), the body responsible for her care. The HSE first attempted to rely upon the *X*-case exception for the teenager's case by claiming that she posed a risk to herself, but Miss D refused to say that she was suicidal. The HSE then wrote to the Gardaí to request that they arrest Miss D if she attempted to leave the country. The HSE also asked that the Passport Office refuse to issue her with a passport. [231]

Miss D was forced to turn to the courts. Finding that were no legal rules to prevent a 17-year-old girl in the care of the Health Service Executive from traveling abroad for an abortion, the High Court in *D (A Minor) v. District Judge Brennan, the Health Services Executive, Ireland, and the Attorney General*, upheld her right to travel. [232]

Miss D's case was one of many that exemplified the particularly challenging burdens that the 8th amendment forced upon women who were already disadvantaged in their access to resources and power. Women in myriad circumstances, such as migrants, asylum seekers and the undocumented, women in lower socio-economic cases, and women with disabilities, struggled to travel abroad for abortions. A woman's health and age could also limit her mobility. As a Dublin city center family planning clinic, the Irish Family Planning Association had a front-row view of the harms of Ireland's restrictive and ambiguous abortion laws. This prompted the organization to support three women to challenge Ireland's legal regime on abortion at the European Court of Human Rights.[233]

In December 2009, the Grand Chamber of 17 Judges of the European Court of Human Rights sat for an oral hearing of *A, B, and C v. Ireland*.[234] The three women argued that Ireland's criminalization of abortion had forced them to travel to England for abortions which had jeopardized their health and wellbeing, in violation of the right to private life under Article 8; the right to be free from cruel, inhuman, and degrading treatment under Article 3 and the right to be free from discrimination per Article 14 of the European

[230] *See, e.g., Irish police cannot stop girl leaving for abortion,* THE GUARDIAN (May 4, 2007) https://www.theguardian.com/world/2007/may/04/ireland.
[231] *See, e.g.,* RTE, *Miss D Can Travel for Abortion*, RTE (May 9, 2007), https://www.rte.ie/news/2007/0509/88757-abortion/.
[232] D (A Minor) v. District J. Brennan, the Health Serv. Exec., Ir. & the Att'y Gen. [2007] unreported judgment of the H. Ct. (Ir.).
[233] The background to this case is discussed in greater detail in Chapter 2.
[234] ABC, supra note 12.

Convention of Human Rights.[235] While the first two applicants had sought abortions for socio-economic reasons, the third applicant had become pregnant after three years of chemotherapeutic treatment for a rare form of cancer, and the pregnancy threatened a recurrence of the cancer. Unable to obtain advice from Irish doctors on whether she was entitled to an abortion in Ireland, and she had an abortion in England.

As in *Open Door and Dublin Well Woman v. Ireland*, Ireland argued that the country's abortion law represented the "profound moral choice of the Irish people as to the nature of unborn life" and added that "for almost 60 years the Court had recognized the diversity of traditions and values of the contracting states" including the right of each contracting state to determine that fetal life is entitled to the right to life.[236]

The litigants maintained that the will of the Irish people had changed since the 1983 referendum; the Irish electorate had voted against so-called 'pro-life' amendments in all referenda since 1983, and opinion polls suggested an appetite for reform. Accordingly, the state's asserted "legitimate aim" for interfering with their human rights was no longer, they claimed, a valid one. The women also underscored the ineffectiveness of Ireland's restrictions in achieving that goal, given that the abortion rate for women in Ireland was similar to states where abortion was legal.[237]

The Court separated the claims of A and B, the 'wellbeing' abortions from C, the potentially life-saving abortion. In C's case, the Court held unanimously that Ireland had violated her right to private life under Article 8.[238] The Court accepted C's argument that the risk to her life should have qualified her for a legal abortion per the *X*-case doctrine; but, because there was no legislation clarifying that medical professionals would not be criminalized for aborting a fetus to save a woman's life, it was rare for doctors to actually carry out such life-saving abortions. Echoing the Irish Supreme Court's condemnation of the government for failing to clarify the meaning of the 8th amendment, the Court concluded that:

> [t]he uncertainty generated by the lack of legislative implementation of Article 40.3.3 (the 8th amendment) and more particularly by the lack of effective and accessible procedures to establish a right to an abortion under that provision, has resulted in a striking discordance

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[235] *See* http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?&p_url=20091209- (Oral Argument).
[236] A., B. & C. v. Ir., App. No. 25579/05, Eur. Ct. H.R. (2009), http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?&p_url=20091209- (Oral Argument,).
[237] ABC, supra note 12 at 170.
[238] ABC, supra note 12 at 253.

> between the theoretical right to a lawful abortion in Ireland on grounds of a relevant risk to a woman's life and the reality of its practical implementation.[239]

In addressing the first two applicants, the Court agreed that Ireland's system of forcing women abroad to have abortions interfered with the women's right to respect for private life. But a majority of 11 judges to 6 declined to hold that the 8th amendment violated the European Convention on Human Rights (ECHR). The majority reasoned that because women had the option of lawfully travelling to another state for an abortion, the state had "struck a fair balance" between protecting the public's interest in securing the right to life of the unborn and the conflicting rights of the women.[240] In particular, given "the acute sensitivity of the moral and ethical issues raised by the question of abortion," Ireland enjoyed a "broad margin of appreciation" in regulating the field of abortion law.[241] Without discussion on the merits, the Court dismissed the applicants' claims that their rights to non-discrimination and freedom from cruel, inhuman, and degrading treatment were abridged.

Because it left the 8th amendment intact, *A, B & C* could be characterized as an anti-abortion victory. However, given the violation of applicant C's right to private life, to comply with the decision, the state was required to finally pass legislation to implement the Supreme Court's *X*-case conclusion that abortion was permissible in Ireland if necessary to save the life of the pregnant women. A year after the decision, on November 2011, the Irish government established an Expert Group to "elucidate" the implications of the ABC case and to recommend a series of options on how to implement the judgment.[242]

A year later, in November 2012, the Expert Group reported to government with four options to clarify the criteria under which abortions could be carried out in order to save a woman's life;[243] to clarify by means of (i) non-statutory guidelines by the Minister for Health (ii) statutory regulations by the Minister by Health[244] (iii) primary legislation or (iv) legislation and statutory guidelines. Before the Government or Oireachtas had the chance to debate these options, a story broke that significantly altered the context for deliberation. A pregnant woman named Savita Halappanavar died while in

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[239] *Id.* 264, 269.
[240] *Id.* 241.
[241] *Id.* 242.
[242] GOV'T OF IR., ACTION PLAN A, B, & C V. IR. APPLICATION NO 25579/2005, GRAND CHAMBER JUDGMENT, (2010), http://www.dohc.ie/press/releases/2011/20110616.html; *See also* Deaglan De Breadun, *Minister Sets Up Expert Group on Abortion Rights*, THE IR. TIMES (November 30, 2011).
[243] DEP'T OF HEALTH AND CHILD., REP. OF THE EXPERT GROUP ON THE JUDGMENT IN A, B AND C V. IR., (2012), http://www.dohc.ie/publications/Judgement_ABC.html [hereinafter, Expert Group Report].
[244] In Ireland, statutory regulations are "an order, regulation, rule, scheme or bye-law made in exercise of a power conferred by statute." They are similar to regulations of various government agencies in the U.S. Statutory Instruments Act 1947.

Galway University Hospital in circumstances where an abortion may have saved her life.

Savita Halappanavar, a dentist of Indian origin who had been living in Ireland for three years, was 17 weeks pregnant when she presented with signs of an impending miscarriage to hospital staff in Galway. Her doctors told her that her pregnancy would not survive, but they wouldn't terminate the pregnancy 'due to their assessment of the legal context.'[245] As Savita and her husband pressed her medical team as to why she couldn't have an abortion when miscarriage was inevitable, a midwife explained that Ireland was "a Catholic country"; until the fetal heartbeat stopped, doctors would not be able to intervene.[246] Instead, the medical team's approach was to "await events." Savita's prolonged miscarriage caused her to develop sepsis. The infection became fatal and forced her to have a heart attack, from which she died at the age of 31.[247]

Until this point in time, Ireland's proximity to the UK meant that the country had largely escaped the deathly impacts of unsafe self-induced or the so-called "backstreet" procedures that cost many lives in countries with restrictive abortion laws.[248] Savita's death, however, was a vividly publicized catastrophe. There was an outpouring of discontent and outage in Ireland and beyond. [249] "*Ireland Murders Pregnant Indian Dentist*" ran a headline from the India Times, just one of a multitude of international headlines that followed her death.[250] Communities held candle-lit vigils across the country with signs reading "Never Again" and "Savita had a heartbeat too." In a way never seen before, public sentiment contested the status quo on abortion, and calls for change were no longer fringe.

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[245] HEALTH SERV. EXEC., FINAL REPORT: INVESTIGATION OF INCIDENT 50278 FROM TIME OF PATIENT'S SELF-REFERRAL TO HOSPITAL ON OCTOBER 21, 2012, TO THE PATIENT'S DEATH ON OCTOBER 28, 2012, 21, 22-53, (2013) (Patient history is derived from the official investigation and final report carried out by the Irish Health Service Executive and commissioned by the hospital.) [hereinafter HSE Report 2013].

[246] *Midwife confirms she told Savita Halappanavar Ireland a 'Catholic country'* RTE News, (April 11, 2013) https://www.rte.ie/news/health/2013/0410/380613-savita-halappanavar-inquest/.

[247] HSE Report 2013, supra note 232. *See also* KITTY HOLLAND, SAVITA: THE TRAGEDY THAT SHOOK A NATION (2013).

[248] This does not mean that there were no deaths. Two months after the *A, B, and C* decision, the state settled a case against it by Michelle Harte (but posthumously with her estate as she had died of cancer by the time of settlement). In the months before her death, Michelle had an abortion in the UK, having been denied both cancer treatment and an abortion in Ireland. Although her doctors had advised her to terminate the pregnancy because of the risk to her health, her treating hospital in Cork refused to authorize an abortion on the basis that her life was not under 'immediate threat.' In order to receive her cancer treatment, Michelle Harte began making arrangements for travel to the UK for an abortion. However, her abortion was delayed owing to her need to obtain a passport, and her cancer returned during this period. Michelle Harte subsequently died from the returned cancer. *See*, *e.g.,* Ir. Council for Civ. Liberties, *Case in Focus: Michelle Harte*, www.iccl.ie/her-rights/health/Michelle-Harte/.

[249] Bridget Fallon, *Protesters in Ireland rally for abortion rights* CNN, (November 18, 2012), https://edition.cnn.com/2012/11/17/world/europe/ireland-abortion-controversy/index.html/; *See* also, Alison O' Connor, *How the Death of Savita Changed the Abortion Debate*, IR. EXAM'R, (October 28, 2017), https://www.irishexaminer.com/business/arid-20461787.html.

[250] Vandita Agrawal, *Ireland Murders Pregnant Indian Dentist,* INDIA TIMES, (November 12, 2012), https://www.indiatimes.com/europe/ireland-murders-pregnant-indian-dentist-47214.html.

Within a month of her story breaking, the government announced plans to follow the recommendation of the Expert Group on ABC by introducing a combination of legislation and guidelines to clarify how medical professionals could determine if an abortion would be legal when a woman's life was at risk, thereby implementing the X-case ruling.[251] Anti-abortion groups, now most forcefully represented by the Pro-Life Campaign, Iona Institute, and the Life Institute, argued that such legislation would "blur the distinction between life-saving medical interventions in pregnancy and induced abortion" and that the inclusion of suicidal ideation would become a "gateway" for widespread abortion availability in Ireland.[252] Youth Defense unveiled campaign posters with a forlorn woman above the caption: "Abortion tears her life apart – there is always a better solution." They were closely followed by the Pro-life Campaign's billboards; "Did you know that 79% of women want Fine Gael to keep its pro-life commitments?" one read, featuring a woman holding a baby.

Similarly, in the Dáil, anti-choice TDs mounted a significant campaign against the legislation, particularly the proposed Act's legalization of abortion in situations where a woman's life was at risk owing to a suicide threat. Brian Walsh TD claimed that the suicide provision would "defile the Statute Book with the absurd premise that the suicidality of one human being can be abated by the destruction and killing of another," while others argued that it would "open the floodgates to widespread abortion" (Eamon O'Cuiv) and "normalize suicidal ideation" (Lucinda Creighton).[253]

Meanwhile, the public's attitude suggested a willingness for reform broader than implementing X. Polling in February 2013 revealed that 78% of respondents supported access to abortion in the case of rape and incest. [254]

A number of pro-choice TDs took advantage of the fact that the government had actually committed to passing abortion legislation to advocate for legislation beyond *X* and *ABC*. Invoking the Irish government's own argument before the European Court of Human Rights in *D. v Ireland* – that the right to life of "the unborn" may not be engaged when fetal abnormality is incompatible with life – a small group of mostly independent

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[251] *See, e.g.,* Gavan Reilly, *Government Will Legislate to Allow Abortion in Line With X Case Ruling*, THE JOURNAL (DECEMBER 18, 2012), https://www.thejournal.ie/ireland-to-legislate-for-abortion-721493-Dec2012/.

[252] *See, e.g.,* PROF. PATRICIA CASEY, ORAL EVIDENCE TO JOINT COMM. ON HEALTH AND CHILD., (2013); PROF. WILLIAM BINCHY, ORAL EVIDENCE TO JOINT COMM. ON HEALTH AND CHILD., (2013).

[253] *See, e.g.,* JOINT OIREACHTAS COMM. ON HEALTH AND CHILD., REPORT ON PUBLIC HEARINGS ON THE IMPLEMENTATION OF THE GOVERNMENT DECISION FOLLOWING THE PUBLICATION OF THE EXPERT GROUP REPORT ON A, B, & C V IRELAND (2013), http://www.oireachtas.ie/parliament/oireachtasbusiness/committees_list/health-and-children/.

[254] *See, e.g.,* Damian Lochrain, *Irish Times' poll: Clear shift in attitude to abortion since* 2013, IR. TIMES (April 20, 2018), https://www.irishtimes.com/news/social-affairs/irish-times-poll-clear-shift-in-attitude-to-abortion-since-2013-1.3467547?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fsocial-affairs%2Firish-times-poll-clear-shift-in-attitude-to-abortion-since-2013-1.3467547.

TDs contended that the legislation should permit access to abortion in the context of fatal fetal anomalies.[255] Three women who had traveled to the UK for abortions in cases of fatal fetal abnormality, including *D* herself, addressed the Dáil to support the legislative plan of the pro-choice TDs.[256] Notably, this was the first time that women who had had abortions spoke about their experience openly before the Dáil.[257]

Following the second set of legislative hearings, the Dáil passed the Protection of Life During Pregnancy Act ("PLDPA") to implement the 1992 judgment in the X case, as required by *A, B and C v. Ireland,* to clarify that abortion would be legal where there was a real and substantial risk to the life of the pregnant woman).[258] Marking a break with the years when anti-abortion groups had dictated the legislative agenda on abortion, the legislature did not exclude suicide risk as grounds for abortion. But pro-choice TDs had not succeeded in determining the scope of the legislation either – the Act did not permit abortion in cases of fatal fetal anomaly.[259] The Act also fell short in solving the legal difficulties raised by Savita's case; doctors could still not intervene and end a pregnancy until a pregnant woman's life, as opposed to her health, was patently at risk. Abortion in any situation other than when necessary to protect a woman's life remained a crime with a penalty of imprisonment for up to fourteen years.

G. From the PLDPA to the Road to Repeal

Though the PLDPA was a victory for pro-choice campaigners in the sense that the state had finally legislated for *X* (21 years later), their concerns were far from abated. The new law did not improve access to abortion; legal abortions in the years that followed averaged typically less than fifty per year.[260] Only 26 "terminations" were carried out in Irish hospitals under the Act the year following its adoption. Three were carried out based on the risk to the life of the woman by suicide, 14 due to the risk from physical illness, and nine based on an emergency situation from physical illness. Under the Act, medical professionals still owed a duty to do everything practicable to

[255] Proposed section 10 by Senators Fiach Mac Conghail and Marie-Louise O'Donnell, in Committee Amendments, 866 No. 4 Dáil Deb., https://data.oireachtas.ie/ie/oireachtas/bill/2013/66/seanad/3/amendment/numberedList/eng/b6613d-scn.pdf.

[256] *See, e.g.,* Niamh Connolly, *D Case Woman Wants to Address Oireachtas Committee Hearings* THE SUNDAY BUS. POST (May 12, 2013).

[257] *See, e.g.,* Kathy Sheridan, *Stories of Abortion*. IR. TIMES (February 25, 2012), https://www.irishtimes.com/news/stories-of-abortion-1.470399.

[258] PLDPA, *supra* note 3.

[259] The government relied on advice from the Attorney General that legislating to permit abortion in cases of fatal fetal abnormality would violate the 8th amendment.

[260] *See, e.g.,* HEALTH SERV. EXEC., NOTIFICATIONS IN ACCORDANCE WITH SECTION 20 OF THE PROTECTION OF LIFE DURING PREGNANCY ACT 2013, http://health.gov.ie/wp-content/uploads/2015/06/annual-report-2014-Protection-of-Life-During-Pregnancy1.pdf.

preserve fetal life, whatever the consequences for a pregnant woman.[261] Commenting on the new act, Dr. Rhona Mahony, Master of Ireland's National Maternity Hospital, explained that:

> the new law has not changed much of the practice. When women get sick, we can't intervene until her life is at risk, and then we have to hope we save her in time.[262]

And though the Act did little to alleviate the burden of travel for abortion seekers, the annual number of women living in Ireland and accessing abortion services outside the country began to fall.[263] The primary reason for this was the increasing use of medical abortions (or the 'abortion pill') in Ireland. Taking – but not obtaining – the pills was illegal. As such, the pills could be prescribed through telemedicine —usually, via international non-profit groups, Women on Web and Women Help Women— and taken at home. Such home use of abortion pills was not, however, a panacea for all women in need of an abortion. In addition to its illegality, its accessibility was limited for women who lacked information, privacy, and residency status. Young women and migrant women faced particular challenges. The non-profits usually mailed the pills to safe addresses in Northern Ireland, where customs were less likely to seize the delivery. Just as going to England was not usually an option for migrant women, crossing the border to Northern Ireland was not always possible.

The case of '*Ms. Y*' vividly captured the reality that some women in Ireland had no options to end unwanted pregnancies. A young migrant woman, *Ms. Y*, discovered that she was pregnant while going through the asylum process in Ireland; she had been raped in her country of origin. [264] Distraught, she repeatedly told the different state agencies and health care workers who were managing her asylum application and her care that she needed to have an abortion; she would otherwise commit suicide.[265] Despite the state's new legislative guarantee in the PLDPA that abortion was legal when a woman's life was at risk, including the risk of suicide, Ms. Y. was

[261] Kitty Holland, *GP Group Adds Voice to Worries About Abortion Act*, IR. TIMES (January 4, 2014) http://www.irishtimes.com/news/social-affairs/gp-group-adds-voice-to-worries-about-abortion-act-1.1643922.
[262] Interview with Dr. Rhona Mahony, Master of the National Maternity Hospital, July 17, 2016.
[263] *See, e.g.,* Sally Sheldon, *Empowerment and Privacy? Home Use of Abortion Pills in the Republic of Ireland* 43(4*)* SIGNS J. OF WOMEN IN CULTURE AND SOC'Y 823 (2018) (noting that the UK Department of Health Statistics recorded 6,672 Irish women obtaining abortion in 2001 and 3,451 in 2015).
[264] *See, e.g.,* Kitty Holland, *Timeline of Ms. Y Case*, IR. TIMES, (October 4, 2014).
[265] *Id.*

denied access to lawful abortion care and was ultimately forced to give birth cesarean.[266]

The same year as Ms. Y's ordeal, the UN Human Rights Committee (HRC) assessed Ireland's compliance with the International Convention on Civil and Political Rights (ICCPR). The Committee condemned the new Act and asserted that its review process effectively gave power to doctors, obstetricians, and psychiatrists to prevent women from terminating their pregnancies, even when termination should be lawful.[267] The Committee recommended that the state rectify its failure to provide women with access to abortion in circumstances in which pregnancy was a result of rape, when a woman is carrying a fetus with fatal abnormalities, and where a woman's health was in danger.[268] The comments by Nigel Rodley, then Chair of the Committee, attracted particular attention:

> Life without quality of life is not something many of us have to choose between, and to suggest that, regardless of the health consequences of a pregnancy, a person may be doomed to continue it at the risk of criminal penalty is difficult to understand . . . Even more so regarding rape when the person doesn't even bear any responsibility and is by the law clearly treated as a vessel and nothing more. [269]

The litany of tragic cases involving the 8th amendment continued. In December of the same year (2014), a team of doctors placed a woman, who had been declared irrecoverably brain dead, on life support—against her family's wishes—in an effort to enable her fetus to be born alive.[270] The woman's medical team believed that the 8th amendment required them to protect "the unborn" in this way;[271] to have somatic care withdrawn, and the woman's father was forced to sue the Irish Health Service.[272]

International criticism of Ireland's abortion law also intensified. In July 2015, the UN Committee on Economic, Social, and Cultural Rights (CESCR) recommended that Ireland revise its legislation on abortion, including the Constitution and the Protection of Life During Pregnancy Act

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[266] Ms. Y also tried to go to the UK but couldn't afford the cost (her only source of money was the state stipend for asylum seekers, which amounted to €19.10 per week) and could not complete the necessary travel permit forms as she not speak English.
[267] UN H.R. Comm., *Prof. C. Flinterman of UNHR Committee on Ireland's Abortion Laws*, YOUTUBE (July 15, 2014), https://www.youtube.com/watch?v=kpzoa3I4oxQ.
[268] *Concluding Observations on the fourth periodic report of Ireland,* [2014] UN Doc CCPR/C/IRL/CO/4.
[269] *Clip of closing comments by Nigel Rodley during Ireland's review under the ICCPR by the UN Human Rights Committee*, YOUTUBE (July 15, 2014), https://www.youtube.com/watch?v=v0NCIB3uHns.;
Ann Cahill, *UN: Irish Abortion Law Treats Women as "Vessels,"* IR. EXAM'R (July 16, 2014), http://www.irishexaminer.com/ireland/unirish-abortion-law-treats-women-as-vessels-275578.html.
[270] P.P. v. Health Serv. Exec., [2014] IEHC 622 (H. Ct.) (Ir.) (unreported).
[271] P.P., [2014] IEHC at 2.
[272] P.P., [2014] IEHC at 12-13.

2013, in line with international human rights standards.[273] The Committee members also remarked on the discriminatory impacts of the law on women who could not afford to go abroad for an abortion or who could not access the necessary information.[274] Their condemnation was followed by the UN Committee on the Rights of the Child (CRC) in 2016, which expresses a number of concerns regarding the impact of Ireland's abortion laws on girls' human rights.[275] Pro-choice activism proliferated, and its base grew stronger and more vocal about the need for access to abortion in Ireland. The campaigning at the UN level was supplemented with myriad forms of advocacy nationally and locally. Some activists used art and street protest were used to bring visibility to the injustice of Ireland's abortion laws. ROSA (for Reproductive rights, against Oppression, Sexism, and Austerity) publicly smuggled abortion pills across the border and around the island by train, bus, and drone, raising awareness and recruiting members along the way. The Abortion Rights Campaign carried out an initiative called 'Chats for Choice' that utilized Facebook Live, a web streaming facility, to counteract misinformation about abortion in a live chat show format. The X-file Project offered a platform for more people to come forward and share their name and portrait in the telling of their abortion stories.[276] Pro-choice groups online and offline promoted first-person abortion story-sharing to "bust stigma" and normalize abortion.[277] Irish women began speaking publicly in unprecedented numbers and with unprecedented candor about their abortion histories.

By February 2016, polling from Amnesty Ireland suggested majority pro-choice sentiment throughout the country.[278] In the general election that same month, most political parties took a position on the future of the 8th amendment in their manifestos. Fine Gael (the majority party in government) committed to establishing a 'Citizens' Assembly' to consider the matter of the 8th amendment, and the Social Democrats proposed repealing the 8th amendment and then having a "people's convention" to consider the legislation that would follow. Sinn Fein, Labour (the minority Government party), the Green Party, the Anti-Austerity Alliance, and People Before Profit all proposed repeal of the 8th amendment followed by legislation to make

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[273] *U.N. CESCR Committee Concluding Observations on the Third Periodic Report of Ireland,* U.N. Docs E/C.12/IRL/CO/3 (2015).
[274] *UN Committee on the Rights of the Child Committee, Concluding Observations on the Third and Fourth Periodic Report of Ireland* U.N. Docs. CRC/C/IRL/CO/3-4.
[275] *Id.*
[276] *See, e.g.,* Ellen Tanham, *Destigmatising Abortion One Face At A Time - The X-Ile Project* HER.IE, https://www.her.ie/news/destigmatising-abortion-one-face-at-a-time-the-x-ile-project-279976 .
[277] *See, e.g.,* Abortion Rights Campaign, *Time to speak out: 2017 Abortion Rights Campaign Speak Out.* ABORTION RIGHTS CAMPAIGN, https://www.abortionrightscampaign.ie/event/time-to-speak-out- 2017-abortion-rights-campaign-speak-out/ .
[278] Amnesty International Ireland, *What You Need to Know About Attitudes to Abortion in Ireland, AMNESTY INT'L IR. (*Feb. 2016), https://www.amnesty.ie/poll/#.

abortion available, although there was little consistency across the parties regarding different levels of availability.[279] Fianna Fáil, the main opposition party, made no mention of abortion in its manifesto.

In May 2016, in the 'Programme for a Partnership Government, the new government committed to establishing, within six months, a Citizens' Assembly to examine the possibility of repealing the 8th amendment.[280] In the meantime, Ireland's abortion law was condemned once again by the Human Rights Committee. In a ground-breaking international human rights law case, *Amanda Mellet v Ireland*[281] the Human Rights Committee held that by denying Ms. Mellet an abortion in Ireland to end a pregnancy with a fatal fetal anomaly, Ireland had subjected her to cruel, inhuman, and degrading treatment.[282] The Committee also found that Ireland had violated Ms. Mellet's right to privacy by interfering with her decision as to how best to cope with her non-viable pregnancy.[283]

The Taoiseach at the time, Enda Kenny, responded that the Human Rights Committee ruling was not binding on the state and rather than reform the law to comply, he proceeded with his plan for the assembly. In July 2016, the government-appointed Judge Mary Laffoy to lead 99 members of the public, randomly selected on the basis of being representative of the Irish electorate in terms of gender, age, and regional spread, to examine the possibility of repealing the 8th amendment. Justice Laffoy's stated priority was to "facilitate an evidence-based approach to discussion and policymaking." Beginning its work in the autumn of 2016, assembly members received oral and written evidence from a number of experts and advocates over the course of 9 months. The evidence covered the legal regulation of abortion in Ireland and abroad, the intricacies of Irish constitutional law, the relationship between domestic law and international human rights law, the experience of medical practitioners in the UK treating women from Ireland who access abortion in England, ethicists, and pro-choice and anti-abortion advocates.[284]

The citizen members themselves insisted on several interventions to help them decide: they asked to be addressed by people with direct experience of the 8th amendment, i.e., women who had, and who had not, accessed

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[279] Mark O'Reagan, *Fine Gael Risks Losing Seats as Kenny 'Ignores Women' Over Abortion Laws*, THE IR. INDEPENDENT (September 25, 2016), http://www.independent.ie/irish-news/politics/fine-gael-risks-losing-seats-as-kenny-ignores-women-over-abortion-laws-35076319.html; Emer O'Toole, *Ireland's Election Result is no Stepping Stone to Abortion Rights: It's a Roadblock,* THE GUARDIAN (March 9, 2016), http://www.theguardian.com/commentisfree/2016/mar/09/ireland-election-abortion-rights-campaign.

[280] GOV'T OF IR., HOUSES OF THE OIREACHTAS, PROGRAMME FOR PARTNERSHIP GOVERNMENT (2017), https://merrionstreet.ie/MerrionStreet/en/ImageLibrary/Programme_for_Partnership_Government.pdf#page=154.

[281] *Mellet v. Ireland, supra* note xx.

[282] *Id.* ¶ 7.4

[283] *Id.* ¶ 7.5.

[284] *See, e.g.,* Fiona de Londras & Mima Markicevic, *Reforming abortion law in Ireland: Reflections on the public submissions to the Citizens' Assembly,* 70 WOMEN'S STUD. INT'L F. 89-98 (2018).

abortion.[285] They also insisted on the rewording of some propositions that had been put to the group, most importantly that in addition to voting to recommend that abortion be legal in situations of rape and serious risk to health, they should have the option to vote for grounds of risk to the woman's health more generally and of socio-economics reasons and women's autonomy.[286] In their final report, on June 29, 2017, the majority of the Assembly members recommended that abortion be available without restriction as to reason up to 12 weeks (48%, with 44% thinking it should be available without restriction up to 22 weeks), up to 22 weeks where there was a risk to a woman's health (including to mental health), on socio-economic grounds up to 22 weeks, where the fetus was diagnosed with a non-fatal anomaly (up to 22 weeks), in cases of rape (up to 22 weeks), where there was a serious risk to the pregnant person's health (without time limit), or where the fetus was diagnosed with a fetal anomaly (without time limit). [287]

The assembly's recommendations went far beyond what most people expected;[288] up until this point, public discourse had mostly focused on exceptions, such as providing abortion in cases of fatal fetal anomalies or situations of rape or incest, and most Irish people had assumed that the assembly would favor this limited solution.[289]

The assembly's recommendations did not necessarily commit the government or parliament to anything.[290] The government responded by establishing the 'Joint Oireachtas Committee on the 8th Amendment of the Constitution' comprised of representatives from various political parties from both houses of the Oireachtas (Dáil and Seanad), to consider the assembly's recommendations. Over a period of three months, the Committee was again addressed by experts, some the same as those who had given testimony to the assembly. This time, however, there was a greater emphasis on international policy and practice on abortion, including best practices on reproductive

[285] The assembly addressed this by recording testimony from people who had and who had not accessed abortion during the time of the 8th amendment and playing those to the citizen members. This occurred in the third weekend of the assembly's deliberations and can be accessed on its website: https://www.citizensassembly.ie/en/Meetings/Fourth-Meeting-of-the-Citizens-Assembly-on-the-Eighth-Amendment-of-the-Constitution.html.

[286] *Id.*

[287] Citizens' Assembly, *Final Report on the Eighth Amendment of the Constitution* (2017), https://www.citizensassembly.ie/en/The-Eighth-Amendment-of-the-Constitution/Final-Report-on-the-Eighth-Amendment-of-the-Constitution/Final-Report-on-the-Eighth-Amendment-of-the-Constitution.html (Ir.).

[288] *See, e.g., When citizens assemble* https://www.allhandsondoc.com/; *See also*, Máiréad Enright, *Abortion and the Citizens' Assembly: Agonist Futures?,* IADC SYMPOSIUM (2018), https://blog-iacl-aidc.org/blog/2018/12/5/abortion-and-the-citizens-assembly-agonist-futures-xb2x6 (a critical reflection on the assembly process).

[289] Patrick Chalmers, *How 99 Strangers in a Dublin Hotel Broke Ireland's Abortion Deadlock*, THE GUARDIAN (March 18, 2018), https://www.theguardian.com/world/2018/mar/08/how-99-strangers-in-a-dublin-hotel-broke-irelands-abortion-deadlock .

[290] *See generally,* David Kennedy, *Abortion, the Irish Constitution, and constitutional change, 5* REV. DE INVESTIGAÇÕES CONSTITUCIONAIS 3, (2018).

health and Ireland's obligations under international human rights law. The World Health Organization, the Guttmacher Institute, BPAS, the Centre for Reproductive Rights, the Irish Human Rights Commission, and a range of other Irish medical, medico-legal, and constitutional law experts addressed the 21 politicians.[291]

The Committee debated whether a limited right to access abortion (e.g., on grounds of rape or risk to life) could be inserted into the Constitution to replace the 8th, but in the end, the Committee voted for 'repeal simpliciter.'[292] Like the Citizen's Assembly, the parliamentary committee recommended that the 8th amendment be repealed from the Constitution and abortion made lawful without restriction as to reason up to a gestational limit of 12 weeks.[293] Several committee members commented that, over the course of their involvement in the Joint Committee, they had changed their minds to favor access to abortion for any reason in the first 12 weeks rather than an exception-based regime.[294]

H. Referendum to repeal the 8th amendment

Upon receipt of the Joint Committee's recommendations, the Cabinet (government ministers) agreed at the end of January 2018 to hold a referendum on the 8th Amendment in May 2018. Their proposal was to remove the 8th and replace it with a text empowering the Oireachtas to pass abortion law. In March, the government also shared a 'general scheme' (Heads of a Bill) for post-repeal legislation.[295] It presented a trimester framework for dealing with abortion; in the first 12 weeks, abortion would be available on request, following a three-day waiting period. Beyond the first trimester of pregnancy, abortion would be available where two medical practitioners certified that there was a risk to the life or of serious harm to the health of the pregnant woman. There was no distinction made between mental and physical health. Abortion would not be permitted beyond the

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[291] *Report of the Joint Oireachtas Committee on the Eighth Amendment* (2018), https://webarchive.oireachtas.ie/parliament/media/committees/eighthamendmentoftheconstitution/Report-of-the-Joint-Committee-on-the-Eighth-Amendment-web-version.pdf (The full list of witnesses is included as Appendix 2 to the Committee's Report); *See also*, Christine Zampas, *Opening Statement to the Oireachtas Joint Committee on the Eight Amendment to the Constitution*, (October 4, 2017), https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_the_eighth_amendment_of_the_constitution/submissions/2017/2017-10-04_opening-statement-ms-Christina-zampas_en.pdf .

[292] *Id.*

[293] *Id.*

[294] Billy Kelleher, *Why I was Persuaded abortion up to 12 weeks Should be Allowed,* ***IR. TIMES*** (March 21, 2018), https://www.irishtimes.com/opinion/why-i-was-persuaded-abortion-up-to-12-weeks-should-be-allowed-1.3433974 .

[295] GOV'T OF IR., GENERAL SCHEME OF A BILL TO REGULATE TERMINATION OF PREGNANCY (2018), https://health.gov.ie/wp-content/uploads/2018/03/General-Scheme-for-Publication.pdf.

point of viability, which was set at the 24th week of pregnancy.[296] Abortion outside the terms of the legislation would remain a criminal offense, although pregnant women would be exempt from prosecution.[297]

Though for the five years prior to the referendum, it had fallen to Independent TDs and other small left political parties to advance pro-choice arguments in the Dáil, by March, all of the political party leaders had announced their support for the repeal movement. Micheál Martin (leader of the opposition Fianna Fáil party) announced on January 19, 2018, that he would campaign to repeal the 8th amendment, even though up until that point, he had been on record as being against abortion access.[298] His u-turn may have been a catalyst for other political figures to come out in support of the repeal movement. Hours after his announcement, Taoiseach Leo Varadkar also announced his support for repeal. In a significant change of position, Minister for Foreign Affairs Simon Coveney (and deputy leader of the government) made a similar announcement. However, key figures in all three main parties – Fine Gael, Fianna Fáil, and Sinn Féin – took different sides in the debate. Some 26 Teachtaí Dála voted against allowing any referendum on the 8th amendment, most of which were from the Fianna Fáil party. Nonetheless, the vote to allow an amendment passed with a majority of 97 to 26 and a referendum was announced for May 25, 2018.[299]

Immediately from the time of the referendum's announcement, opinion polling showed a consistent lead for the 'Yes' side.[300] In March, the main campaign movement for a Yes vote, "Together for Yes," launched. It represented a coalition of three large pro-choice organizations, namely the Coalition to Repeal the 8th amendment, the Abortion Rights Campaign, and the National Women's Council. Professional and cultural organizations formed support groups, such as Nurses Together for Yes, Psychologists Together for Yes, Farmers for Yes. Crucially, Together for Yes mobilized hundreds of grassroots networks to conduct a mass canvassing operation. In every constituency in the country, local Together for Yes groups, comprised of men and women of all ages (but primarily young people), canvassed door to door. Every canvassing group logged responses on a specially designed

[296] Sarah Bardon, *Abortion Legislation: The Really Contentious Bits*, IR. TIMES (May 12, 2018), https://www.irishtimes.com/news/social-affairs/abortion-legislation-the-really-contentious-bits-1.3490740.
[297] GOV'T OF IR., GENERAL SCHEME OF A BILL TO REGULATE TERMINATION OF PREGNANCY (2018), https://health.gov.ie/wp-content/uploads/2018/03/General-Scheme-for-Publication.pdf.
[298] *See, e.g.,* Pat Leahy, *Micheál Martin's Abortion Stance a Response to Strong Mood for Change,* IR. TIMES (January 18, 2018), https://www.irishtimes.com/opinion/miche%C3%A1l-martin-s-abortion-stance-a-response-to-strong-mood-for-change-1.3361479.
[299] *See, e.g.,* Sarah Bardon, Marie O'Halloran & Michael O'Regan, *Abortion referendum to go ahead following Dáil vote* IRISH TIMES (March 21, 2018) https://www.irishtimes.com/news/politics/Oireachtas/abortion-referendum-to-go-ahead-following-dáil-vote-1.3435008.
[300] Irish Times/Ipsos MRBI Poll January 28, 2018, https://www.irishtimes.com/news/politics/poll/poll-january-25th-2018.

software package that fed data from doorsteps all over the country to the campaign headquarters in Dublin.[301]

Notably, the Together for Yes messaging over the three months of the referendum campaign focused on "Care, Compassion and Change" rather than on a woman's right to choose or women's freedom. Emphasizing the need to repeal the 8th in order to provide compassionate care to women who were pregnant because of rape, or women who make hard decisions to end pregnancies because their child won't survive to term, Together for Yes aimed at appeasing the alleged anti-choice instincts of a 'middle Ireland' or Ireland's 'middle ground.'[302] The campaign also argued that repeal was necessary to alleviate the legal and medical risks for women and girls who sourced abortion pills online and self-administered abortion without medical supervision. Voices from the medical community were front and center, as well as women—with husbands who had experienced pregnancies with fetal anomalies. Some commented that voices heard at its public demonstrations almost always had recognizably middle-class accents.[303]

The Catholic Church urged Irish Catholics to become "missionaries for the cause of life" in the run-up to the referendum. The *No* campaign, led by a coalition known as *Save the 8th*, however, did not invoke religion. Its messaging focused, instead, on portraying the proposed legislation as being 'too extreme' and likely to result in a large number of abortions occurring in Ireland.[304] It frequently invoked claims about 'vulnerable' cases, such as children with disabilities, and the likelihood that abortion would be used to reduce the number of children born with particular needs. Factions of the campaign framed abortion as murder, using the hashtag '#repealkills' on social media.

On May 25, 2018, polling stations opened from 8 am – 10 pm. Until this day, no Irish citizen under the age of 53 had ever had the option of liberalizing Ireland's abortion law. Media reported that thousands had flown home from abroad to vote for repeal.[305] Analysts predicted a narrow victory for Yes.

"Feminist Christmas"[306] began when the Irish Times reported the first exit poll at 10 pm on the night of the vote. The exit poll indicated that the

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[301] Interview with Laura Harmon, Mobilization Director, Together for Yes, Jun, 10th, 2018.
[302] *Id. See also* GRAINNE GRIFFIN ET AL.; IT'S A YES! HOW TOGETHER FOR YES REPEALED THE EIGHT AND TRANSFORMED IRISH SOCIETY (2019); Sandra Duffy *A change is gonna come: Reflections on the repeal campaign* (2019), https://sandraduffy.wordpress.com/2019/01/07/a-change-is-gonna-come-reflections-on-the-repeal-campaign/.
[303] Paola Rivetti *Race, identity, and the state after the Irish abortion referendum* FEMINIST REVIEW, 121, 122 (2019).
[304] *See, e.g.,* Save the 8th *Preborn babies will have NO rights* www.save8.ie.; For more, *see* Niamh Nicgabhann, *City walls, bathroom stalls and tweeting the Taoiseach: the aesthetics of protest and the campaign for abortion rights in the Republic of Ireland*, 32 (5) JOUR. OF MEDIA & CULTURAL STUDIES 2018.
[305] Molly Hunter, *Irish from all over the world are flying home to vote in Ireland's abortion referendum* (May 24, 2018) https://abcnews.go.com/International/irish-world-flying-home-vote-irelands-abortion-referendum/story?id=55380085.
[306] *See, e.g.,* Katha Pollitt, *It's feminist Christmas in Ireland*, (May 28, 2018) https://www.thenation.com/article/its-feminist-christmas-in-ireland/.

repeal vote had won by a landslide, a margin of 68% to 32%.[307] In an almost exact reverse of the 1983 referendum, in the actual confirmed result, repeal succeeded with a vote of 66.4% percent.[308] The Yes vote was carried in 39 out of 40 constituencies, and there was a majority vote for repeal in almost every demographic. Savita Halappanavar's father, Andanappa Yalagi, spoke of the referendum result as providing justice, at last, for his daughter.[309] Following the declaration of results in Dublin Castle, the Taoiseach, Leo Varadkar, described the outcome as "the culmination of a quiet revolution that has been taking place in Ireland over the last couple of decades."[310] In response, Irish abortion rights activists noted that it was Varadkar's Government and his political party who had attempted to mute their demands for so many years.

The Thirty Sixth Amendment of the Constitution Act 2018 formally removed the 8th amendment from the Irish Constitution and replaced it with a new Article 40.3.3, which states that "provision may be made by law for the regulation of termination of pregnancy"). With the power to enact legislation on abortion, the Oireachtas repealed the Protection of Life During Pregnancy Act and introduced the Health (Regulation of Termination of Pregnancy) Act 2018 (HRTPA), which came into effect in January 2019. Mirroring the legislative proposals offered before the referendum vote, the act recognizes four grounds within which abortion is legally available in Ireland. Abortions are now legally available, without cost, upon request until 12 weeks of pregnancy, subject to two conditions: (i) confirmation from a medical practitioner that the pregnancy has not reached more than 12 weeks and (ii) following a waiting period of 3 days after the certification that the pregnancy is under 12 weeks. Abortions at any point beyond 12 weeks are only allowed in cases where there is a risk to the life or of "serious harm" to the health of the pregnant woman as certified by two medical practitioners, in circumstances where the fetus has not reached viability;[311] in emergency cases - where a medical practitioner is of a reasonable opinion that there is "an immediate risk" to the life or of serious harm to the health of a pregnant woman and that a termination must be carried out immediately to avert that

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[307] *See, e.g.,* Pat Leahy, *Irish Times exit poll projects Ireland has voted by landslide to repeal Eighth* https://www.irishtimes.com/news/politics/irish-times-exit-poll-projects-ireland-has-voted-by-landslide-to-repeal-eighth-1.3508861.

[308] *See, e.g.,* Elections Ireland, Referendum of May 25, 2018, 36th Amendment: Regulation of Termination of Pregnancy (Repeal of 8th Amendment), https://electionsireland.org/results/referendum/refresult.cfm?ref=201836R (last visited September 1, 2018).

[309] Megan Specia *How Savita Halappanavar's death spurred Ireland's abortion rights campaign* NEW YORK TIMES (May 27, 2018) https://www.nytimes.com/2018/05/27/world/europe/savita-halappanavar-Ireland-abortion.html.

[310] RTE News, *Result is culmination of quiet revolution, says Varadkar* (May 26, 2018) https://www.rte.ie/news/eighth-amendment/2018/0526/966132-reaction/.

[311] Section 8, HRTPA states that: "viability" means the point in a pregnancy at which, in the reasonable opinion of a medical practitioner, the fetus is capable of survival outside the uterus without extraordinary life-sustaining measures."

risk;[312] and in cases of fatal fetal abnormality. Doctors who provide abortions outside these terms continue to risk arrest, prosecution, and up to 14 years in prison—just as they did before the referendum.[313] The Act mandates an inquiry into the operation of the law after three years.

This chapter focused on key moments in the development of Ireland's abortion regime, including its ultimate demise. Amidst, rather than beyond, such legal and political contestation were the experiences of women who lived, and sometimes died, under Ireland's restrictive laws. The next two chapters of this dissertation study, in much greater depth, women's experiences of the law in terms of both their pain at the hands of the 8th and their long-standing activism and defiance in spite of their suffering.

[312] Section 10, HRTPA.

[313] *See, e.g.,* Caelinn Hogan, *Why Ireland's battle over abortion is far from over*, THE GUARDIAN (OCTOBER 3, 2020) https://www.theguardian.com/lifeandstyle/2019/oct/03/whyirelands-battle-over-abortion-is-far-from-over-anti-abortionists.

CHAPTER 2: THE ROLE OF INTERNATIONAL HUMAN RIGHTS IN THE REFORM OF IRISH ABORTION LAW

Over the decades, Irish pro-choice groups employed numerous strategies in their struggles for change. Activists battled a stalwart anti-choice lobby and unmoving political elites with everything from street protests, legal challenges, social media campaigns, lobbying, artistic activism, abortion stigma busting, to service provision (both funding and providing abortions). Many of these strategies were infused with and augmented by international human rights-based advocacy. In contrast to the treatment of abortion as a crime under the 8th, international and regional human rights law recognizes that the denial of abortion, in a range of circumstances, violates fundamental human rights.[314] Consequently, non-governmental organizations, grassroots activists, and victims embraced international human rights. As Chapter 1 outlined, Irish advocates took complaints to the UN Human Rights Committee.[315] and the European Court of Human Rights,[316] engaged in 'shadow reporting'[317] and in-person advocacy before UN Treaty Monitoring Bodies (TMBs) and UN Special Procedures, emphasized human rights when campaigning domestically and organized in human rights coalitions. This chapter charts these efforts and analyzes their impact.

In turning to the international human rights framework to advance their cause, Irish advocates emulated reproductive rights movements across the globe. In all regions of the world, abortion rights activists invoke international human rights in their efforts to overturn domestic restrictions on abortion, and at the international level, advocates seek to consolidate and expand recognition for sexual and reproductive rights. These efforts have delivered

[314] *See infra*, pp 66-96.
[315] *See Mellet v Ireland*, *supra* note xx and *Whelan v Ireland, supra* note xx..
[316] *See A, B, and C v Ireland, supra* note 12.
[317] Shadow reporting is a process where NGOs provide submissions to the expert bodies that periodically monitor the implementation of the international human rights treaties, covenants, and conventions to which the state is a signatory. Shadow reports address omissions, deficiencies, or inaccuracies in the official government reports and thereby assist U.N. experts in their assessment of a government's compliance with international human rights. Irish pro-choice groups submitted shadow reports to the Committee Against Torture Committee, the Committee for the Elimination of All Forms of Discrimination Against Women, the Committee on Economic, Social & Cultural Rights, the Human Rights Committee, and to the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health in preparation for his report A/66/254 (2011) on the interaction between criminal laws and other legal restrictions relating to sexual and reproductive health and the right to health.

many successes in different countries,[318] and in international fora,[319] but they have not been universally effective, nor are the gains secure. Over the past 5-10 years, a coordinated global pushback against reproductive rights (and the rights of sexual orientation and gender identity minorities) has gained significant momentum.[320] Waged by alliances of conservative political actors and religious fundamentalists — often presenting as human rights groups — these actors use litigation and advocacy at national and international levels to oppose a range of reproductive rights: access to abortion, contraception and fertility treatments, and the provision of evidence-based, comprehensive sexuality education.[321] At the multilateral level, blocs of States have mirrored and augmented their practices to dilute international protections for reproductive rights, sexuality rights, and self-determination.[322] And increasingly, campaigns that misleadingly — and incorrectly under international law — assert a human right for healthcare professionals (and even institutions) to 'conscientiously object' to providing both abortion and contraception are gaining traction.[323] Amidst such virulent pushback to the

[318] Courts in countries of Africa, Asia, Europe, and Latin America increasingly reference human rights standards in their review of national abortion laws. *See* Rachel Rebouche, *Abortion Rights as Human Rights*, 25(6) SOCIAL & LEGAL STUDIES 40 (2016) (illustrating how human rights arguments have accommodated diverse national considerations and disparate legal standards on abortion). The results of successful international human rights advocacy can also be seen in the expanding body of regional and international human rights standards that advance access to abortion as a human right that will be discussed in this chapter. *See also*, Breaking Ground: Treaty Monitoring Bodies on Reproductive Rights, CTR. FOR REPROD. RIGHTS (2018), https://www.reproductiverights.org/ sites/crr.civicactions.net/files/documents/Breaking-Ground-2018.pdf .

[319] *See infra*, pp 64-96.

[320] For a discussion of this phenomenon s*ee*, Observatory on the Universality of Rights, *Rights at Risk*, (2017), https://www.awid.org/publications/rights-risk-observatory-universality-rights-trends-report-2017; Claire Provost & Ella Milburn *Christian 'legal army' in hundreds of court battles worldwide* (2017) OPEN DEMOCRACY https://www.opendemocracy.net/en/5050/christian-legal-army-court-battles-worldwide/

[321] For a discussion of this phenomenon s*ee*, Observatory on the Universality of Rights, *Rights at Risk*, (2017), https://www.awid.org/publications/rights-risk-observatory-universality-rights-trends-report-2017; Claire Provost & Ella Milburn *Christian 'legal army' in hundreds of court battles worldwide* (2017) OPEN DEMOCRACY https://www.opendemocracy.net/en/5050/christian-legal-army-court-battles-worldwide/ They also oppose marriage equality, parenting rights for same-sex couples, self-determination for gender-diverse individuals. Principal among their strategies is the co-option and misuse of human rights protections for freedom of religion and belief, the right to life, and the family. *See*, *e.g.*, UN Human Rights Council, Report of the Special Rapporteur on freedom of religion and belief (2020) A/HRC/43/48; UN Human Rights Council, Report of the Special Rapporteur in the field of cultural rights (2017) A/HRC/34/56; A/74/181, ¶34–35; UN Human Rights Council, Report of the Working Group on the issue of discrimination against women in law and in practice, A/HRC/38/46, ¶30–35; and A/HRC/21/42, ¶ 65.

[322] At the United Nations General Assembly in 2019, a group of 19 governments disavowed the inclusion of 'sexual and reproductive health and rights in U.N. documents, alleging that "they can undermine the critical role of the family and promote practices like abortion." Remarks on Universal Health Coverage, Alex M. Azar II, U.N. General Assembly Press, September 23, 2019, New York City, New York, https://www.hhs.gov/about/leadership/secretary/speeches/2019-speeches/remarks-on-universal-health-coverage.html. See also, Jayne Huckerby et al., *Trump's "Unalienable Rights" Commission Likely to Promote Anti-Rights Agenda,* JUST SECURITY (July 9, 2019), https://www.justsecurity.org/64859/trumps-unalienable-rights-commission-likely-topromote-anti-rights-agenda/ . Additionally, in April 2019, the US successfully used the threat of its veto power on the UN Security Council totg9 9 demand that removal of language recognizing that victims of rape in war should have "access to sexual and reproductive health services," from Resolution 2467.

[323] *See, e.g.*, Diana Cariboni, *How 'conscientious objectors' threaten women's newly-won abortion rights in Latin America*, July 18, 2018, https://www.opendemocracy.net/en/5050/conscientious-objectors-threaten-abortion-rights-latin-america/; For an example of arguments used by such campaigners, July 18, 2018, *see* https://www.adflegal.org/detailspages/blogdetails/allianceedge/2016/04/13/four-things-we-can-still-do-now-for-pro-life-healthcare-providers .

advancement of reproductive rights, it is compelling to consider the role of international human rights in upending one of the most restrictive abortion regimes in the world.

This study also presents insights relevant for social movement scholars and international relations theorists concerned with the legitimacy and utility of the international human rights framework in domestic politics. Many scholars (and activists) cast doubt on the utility and legitimacy of international human rights to advance social change.[324] The polemics are applied to human rights movements beyond abortion rights; human rights, whether conceived as discourse, law, or values, face incessant claims of irrelevance and predictions of demise. Within this milieu of critiques, scholars query whether international human rights, as a "universalist discourse," is the best foundation on which to build local political leverage for reform.[325] Others argue that conceptions of human rights can miss the technical and practical work of implementing social and legal reform.[326] Scholars suggest a tendency of human rights advocacy to ignore the underlying cause of rights violations and to distract attention from broader, structural causes of injustice and oppression.[327] The array of international legal rules and institutions are condemned for their limited enforcement machinery.[328] and their "lack of democratic accountability."[329] Some skeptics go further and contend that the growth of legal and political international human rights movements was a companion to the rise of global inequality, which paved the road to populism and further rights abuses.[330]

While Chapter 1 of this dissertation briefly documented Irish pro-choice international human rights advocacy and litigation, this chapter digs deeper into the practices of domestic advocates and the influence of international human rights on the abortion rights movement. By examining how pro-choice "civil society[331] (a term used in both human rights literature and in

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[324] *See, e.g.,* Laura Nader, *The Americanization of International Law*, in MOBILE PEOPLE, MOBILE LAW: EXPANDING LEGAL RELATIONS IN A CONTRACTING WORLD 207–08; Sari Kouvo, *A "Quick And Dirty" Approach to Women's Emancipation and Human Rights*? 16 FEM. LEGAL STUD. 37, 39–40 (2008); Susan Marks, *Human Rights, and Root Causes*, 74 MOD. L. REV. 57, 78 (2011) Anne Orford, *Feminism, Imperialism, and the Mission of International Law*, 71 NORDIC J. INT'L L. 275, 296 (2002); Dianne Otto, *The Exile of Inclusion: Reflections on Gender Issues in International Law Over the Last Decade*, 10 MELB. J. INT'L L. 11, 12 (2009).

[325] *See also*, Sally Engle Merry, *Human Rights, and Transnational Culture: Regulating Gender Violence Through Global Law*, 44 OSGOODE HALL L.J. 54, 55–57 (2006); Sally Engle Merry, *Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection from Violence*, 25 HUM. RTS. Q. 343, 344 (2003).

[326] Rachel Rebouche, *Reproducing Rights: The Intersection of Reproductive Justice and Human Rights* 7 U.C. IRVINE L. REV. 579 (2017).

[327] *See, e.g.*, Morton Horwitz, *Rights* 23 HARV. CIVIL RIGHTS–CIVIL LIB. L. Rev 393, 400 (1988).

[328] *See, e.g.*, Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?* I YALE L.J. 1935 (2002); ALICE EDWARDS, VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL HUMAN RIGHTS LAW (2011).

[329] *See, e.g.,* ERIC POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW; David Kennedy, *The international human rights movement: Part of the problem* 15 HARV. HUMAN RIGHTS JOURNAL 101 (2004).

[330] *See, e.g.*, SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018).

[331], "civil society is a term used in both literature and in practice to describe actors that are distinguishable from government or profit-seeking agents or individuals. See, Richard Price, *Transnational Civil Society and Advocacy in World Politics* 55(4) WORLD POLITICS, 579 (2003).

practice to describe actors that are distinguishable from government or profit-seeking agents) used human rights advocacy at different points in their reform efforts in Ireland, this identifies four interlocking roles played by international human rights law and advocacy: 1) a formative role; 2) a formal legal role; 3) a structural role, and 4) a framing role. However, within this account, the constraints of international human rights law for abortion rights reform emerge. International human rights legal standards on abortion access did not mirror the movement's ultimate vision of unrestricted access to abortion for women in Ireland; as the movement moved from the margins to the center, international human rights law ran out as a resource.[332]

Part I of this chapter sets out the current international legal standards on abortion rights and discusses how these standards developed within the United Nations and regional human rights systems. The trajectory of international human rights law on abortion includes several instances where human rights bodies considered the compatibility of Irish abortion law with international standards. Accordingly, there is some repetition from Chapter 1, and these cases are also outlined in Part II of this chapter.

Part II documents and analyzes how Irish pro-choice activists used international human rights-based strategies to create legal, political, and cultural opportunities for reform. Though there are elements of chronology in the analysis, the study cannot be told in an exact chronological account.

This chapter concludes that at key moments, human rights-based strategies were critical to mobilize and gain leverage and legitimacy but cautions that the formal doctrine of international human rights law on abortion risks ambivalence for emancipatory movements for abortion rights.

A. The Trajectory of International Human Rights Law on Abortion

The texts of most human rights treaties and related international agreements are silent on abortion. However, since the 1990s, women's rights activists have used international human rights mechanisms to advance protection for abortion rights. Similar to arguing that abortion rights are implicit in provisions of domestic constitutions (as done in the US in *Roe v. Wade*[333]), human rights advocates who campaign for abortion rights urge human rights bodies[334] to infer protection for abortion from other textually explicit rights. As a result, even though there is no stand-alone woman's right

[332] For a contrasting view on the relevance on substantive content, *see* Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89, 103–04 (1996) (suggesting that women's rights advocates focus on the adequacy of rights rather than implementation of rights).
[333] *Roe v Wade*, 410 US 113 (1973). The US Supreme Court recognized that the right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy.".
[334] The term "human rights bodies" is used to include both regional human rights courts and UN Treaty Monitoring Bodies.

to abortion in international human rights law, a number of human rights bodies—those charged with interpreting treaty provisions—have asserted national abortion restrictions to violate the right to life, right to health, right to privacy, right to liberty and security of the person, right to equality before the law and right to non-discrimination, and right to be free from torture or cruel, inhuman, or degrading treatment or punishment.

Additionally, various human rights bodies have reached decisions that use human rights norms to pressure states to implement their own national exceptions to abortion bans. For example, some human rights bodies have contended that when States permit abortion in certain circumstances, the state is obliged to adopt legislation and/or guidelines to make clear when abortion is legal and when it is not.[335] Others have said that states must ensure that legal abortion services are effective, timely, and practically accessible,[336] and that states should provide quality post-abortion care irrespective of whether individuals have undergone a legal or illegal abortion.[337] Most have recommended that abortion should be decriminalized[338] and the CEDAW Committee has described the denial of abortion, in certain instances, as a form of gender-based violence.[339] All told, a set of norms is emerging from the international human rights framework that recognizes that the denial of abortion in certain circumstances is a violation of the universal human rights of women and girls.

Notwithstanding these inroads, the scope of the developing norms concerning abortion is limited. In particular, these norms are limited by the willingness to recognize an affirmative right to an abortion only for "exceptional" cases. Unless a woman's pregnancy is the result of sexual assault (rape or incest), threatens her life or her health, or is not capable of surviving to term, human rights bodies have not recognized access to abortion as a human right.[340] Chapter 3 analyzes this limited scope from a critical

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[335] *See infra xx*

[336] The European Court of Human Rights has emphasized this in numerous cases. See detailed discussion of the relevant decisions *infra* at xx

[337] General Comment No. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), May 2, 2016, E/C.12/GC/22.

[338] *See, e.g.,* CEDAW, General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19, July 14, 2017, CEDAW/C/GC/35 at ¶ 18; CCPR/C/IRL/CO/4; Committee on Economic, Social and Cultural Rights, Concluding observations on the third periodic report of Ireland, July 8, 2015, E/C.12/IRL/CO/3 at ¶ 30.

[339] In 2017, the Inter-American Commission on Human Rights (IACHR) said that "without being able to effectively exercise their sexual and reproductive rights, women cannot realize their right to live free from violence and discrimination." See, *IACHR Urges All States to Adopt Comprehensive, Immediate Measures to Respect and Protect Women's Sexual and Reproductive Rights* October 23, 2017, https://mailchi.mp/dist/iachr-urges-all-states-to-adopt-comprehensive-immediate-measures-to-respect-and-protect-womens-sexual-and-reproductive-rights?e=07a43d57e2. The CEDAW Committee has also described criminalization of abortion and denial or delay of access to legal abortion as "forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment." CEDAW Committee, *General Recommendation 35 on gender-based violence against women* (2017), ¶18.

[340] The limits of these standards

perspective

Examining treaty provisions, decisions of human rights bodies,[341] general comments and concluding observations by human rights bodies, international consensus statements, and the outputs of the UN special procedures, this section outlines how the United Nations, European, Inter-American, and African human rights accountability mechanisms have interpreted human rights treaties to support abortion access.[342] From this examination will emerge a picture of both the successes of international human rights theories in resisting abortion restrictions and the limitation of those theories.

1. *The right to life*

The right to life provides one source of protection under international human rights law for women seeking abortion access. The right to life is protected by international human rights treaties and customary international law. Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Article 6 of the Convention on the Rights of the Child (CRC) states that "every child has the inherent right to life." Similar provisions can be found in Art. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ('ECHR'), Art. 4 of the American Convention on Human Rights, and Article 4 of the African Charter on Human and Peoples' Rights, which recognizes that everyone is entitled to respect for his or her life and safety.[343]

Unsafe abortions currently account for approximately 10-14% of the maternal mortality rate globally. Abortion is not inherently dangerous[344]—in most countries, it is safer than childbirth—but legal restrictions result in millions of women either seeking abortions "underground" from untrained persons or self-inducing using methods that risk their lives. The grievous

[341] Similar to a court being petitioned, Treaty Monitoring Bodies can receive "communications" from individuals against states that have provided their consent for this procedure. The body then forwards its 'views' to the state party and the individual concerned. While these views are not directly binding on states, they "exhibit some important characteristics of a judicial decision" because "they are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions. *See, e.g.*, General Comment 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, June 25, 2009, CCPR/C/GC/33 at ¶ 13.

[342] The UN *special procedures* are independent human rights experts appointed by the U.N. Human Rights Council to monitor human rights around the world, report on violations, and recommend strategies for governments and other stakeholders to improve human rights conditions. They conduct thematic studies and convene expert consultations, contribute to the development of international human rights standards, engage in advocacy, and provide advice for technical cooperation.

[343] African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

[344] *See, e.g.*, Susheela Singh et al., *Abortion Worldwide 2017: Uneven Progress and Unequal Access,* GUTTMACHER INSTITUTE, 2018 https://www.guttmacher.org/report/abortion-worldwide-2017.

methods women use to end unwanted pregnancies include placing foreign objects or herbal preparations in the vagina or cervix, ingesting substances, or inflicting direct trauma on their bodies. Complications include hemorrhage, sepsis, peritonitis, and trauma, many of which result in these women losing their lives.[345] Meanwhile, the scale of post-abortion complications is substantial, with an estimated 7 million women and girls worldwide admitted to hospital every year owing to complications related to unsafe abortion.[346]

The advent of the 'abortion pill'—a common and cheap stomach-ulcer drug, misoprostol, mostly used in combination with another drug, mifepristone, to end a pregnancy in the first trimester—means that abortion-related deaths are far less common than they were a few decades ago. Still, every year, somewhere between 50,000 and 70,000 women die as a consequence of unsafe abortions (97% in developing countries).[347] Because so many of these deaths could be prevented by access to legal abortion—where abortion is legally restricted, the median ratio for unsafe abortion mortality is 34 deaths per 100,000 live births, compared with one or less per 100,000 live births in countries that allow abortion on request[348]—human rights law recognizes that restrictive abortion laws can violate the right to life.

The most recent international human rights law authority recognizing that abortion restrictions violate the right to life is the Human Rights Committee's 2018 General Comment on the right to life — an influential interpretative instrument that aims to clarify the normative scope of the treaty provision on the rights to life. [349] The Human Rights Committee articulated that while States can regulate abortion, restrictive abortion laws violate the right to life when they expose women to a risk of death from unsafe abortion,[350] and recommended that States "provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl are at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result

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[345] David A. Grimes et al., *Unsafe Abortion: The Preventable Pandemic*, 368 LANCET 1908, 1911 (November 6, 2006), http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(06)69481-6.pdf.

[346] *Id.*

[347] World Health Organization (WHO), *Safe abortion: Technical & policy guidance for health systems, World Health Organization* (2015) http://apps.who.int/iris/bitstream/handle/10665/173586/WHO_RHR_15.04_eng.pdf;jsessionid=64E5FCC0E3763E34CA2B0CF9C2395646?sequence=1. Furthermore, it is estimated that 220,000 children lose their mothers every year due to unsafe abortions. Researchers suggest that these children are at a greater risk of death in comparison with children who have two parents as a result of receiving less education, health care, and social care. *See* David Grimes et al, *supra* note 322; *See also*, UN Office of the High Commissioner for Human Rights, *"Unsafe abortion is still killing tens of thousands of women around the world – UN rights experts warn"* (September 28, 2016) http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20600&LangID=E.

[348] *See, e.g.*, Singh S et al., *Abortion Worldwide 2017: Uneven Progress and Unequal Access*, Guttmacher Institute, *2018,* https://www.guttmacher.org/report/abortion-worldwide-2017 .

[349] HRC General Comment No. 36 (2018) on the right to life, UN Doc. CCPR/C/GC/36 (2018) ¶ 8 [hereinafter HRC General Comment No. 36].

[350] *Id.*

of rape or incest or is not viable."[351] Prior to this guidance, the Human Rights Committee had long expressed particular concern for restrictive abortion laws and the risk to women's lives when reviewing State compliance with the International Covenant on Civil and Political Rights (ICCPR).[352]

Other UN Treaty Bodies, including the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Discrimination against Women (CEDAW), and the Committee on the Rights of the Child (CRC), have also underscored the link between the denial of abortion and maternal mortality and addressed the denial of abortion as a violation of women's right to life.[353] The CESCR Committee called on States to amend restrictive abortion laws and to increase access to legal abortion in order to decrease maternal deaths.[354] To guarantee women's right to life "in practice," the CESCR Committee urged States to ensure that life-saving abortion services are accessible by adopting, for example, guidelines on legal abortion and guaranteeing that conscientious objection laws are not an obstacle to abortion.[355]

As of the year 2020, nearly all UN Treaty Monitoring Bodies recognize access to abortion as part of the right to life when denial poses a risk to the woman's life. As a result, States are obliged to ensure that women do not put

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[351] *Id*. Notably, drafting General Comment No. 36 was an unusually protracted process—it took almost 4 years. The first draft was circulated in 2015 and included references to "the rights of unborn children, including to their right to life." In response, a coalition of women's rights organizations lobbied the Committee to delete from the draft any express references to "the rights of the unborn children" or any other turn of phrase that may have implied that the right to life under the ICCPR applied before birth. Interview with Christina Zampas, Human Rights Lawyer, Geneva, March 3, 2017. *See, also*, *Livio Zilli*, *The UN Human Rights Committee's General Comment 36 on the Right to Life and the Right to Abortion*, March 6, 2019 http://opiniojuris.org/2019/03/06/the-un-human-rights-committees-general-comment-36-on-the-right-to-life-and-the-right-to-abortion/ .

[352] *See, e.g.,* Concluding Observations of the HRC regarding El Salvador, August 22, 2003, CCPR/CO/78/SLV at ¶14; HRC, Concluding observations on Ecuador, CCPR/C/ECU/CO/6 (2016), ¶15; Human Rights Committee, Concluding Observations: Argentina, UN Doc. CCPR/C/ARG/CO/5 (2016), ¶ 12. The UN Special Rapporteur on Arbitrary Killings has articulated that the death of a woman, where it can be medically linked to a deliberate denial of access to life-saving medical care because of an absolute ban on abortion, would not only constitute a violation of the right to life and an arbitrary deprivation of life. Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions on a gender-sensitive approach to arbitrary killings, (2017), ¶ 95.

[353] CESCR, General Comment No. 22 on the right to sexual and reproductive health (2016), ¶ 10; Committee on the Rights of the Child, General Comment No. 20 on the implementation of the rights of the child during adolescence, UN Doc. CRC/C/GC/20 (2016), ¶¶ 13 and 60; CEDAW Committee, "Statement of the Committee on the Elimination of Discrimination against Women on sexual and reproductive health and rights: Beyond 2014 ICPD review," 57th Session (2014) http://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/SRHR26Feb201.

[354] *See, e.g.,* Concluding observations of the CESCR on Ecuador, UN Doc. E/C.12/ECU/CO/3 (2012), ¶.29; Concluding observations of the CESCR on the Republic of Korea, UN Doc. E/C.12/KOR/CO/4 (2017); Concluding observations of the CESCR on the Philippines, UN Doc. E/C.12/PHL/CO/5-6 (2016); Concluding observations of the CESCR on Kenya, UN Doc. E/C.12/KEN/CO/2-5 (2016); and Concluding observations of the CESCR on Pakistan, UN Doc. E/C.12/PAK/CO/1 (2017).

[355] *See, e.g.,* CESCR concluding observations on Spain, UN Doc. E/C.12/ESP/CO/6 (2018); Concluding observations of the CESCR on Mexico, UN Doc. E/C.12/MEX/CO/5-6 (2017); Concluding observations of the CESCR on Moldova, UN Doc. E/C.12/MDA/CO/3 (2017); Concluding observations of the CESCR on Uruguay, UN Doc. E/C.12/URY/CO/5 (2107); Concluding observations of the CESCR on Poland, UN Doc. E/C.12/POL/CO/6 (2016); and Concluding observations of the CESCR on Costa Rica, UN Doc. E/C.12/CRI/CO/5 (2016).

their lives at risk by procuring life-threatening abortions.[356] Regionally, human rights experts have taken the same approach: the Organization of American States Rapporteur on the Rights of Women confirmed that women in the Central and South American region face "significant obstacles in exercising their sexual and reproductive rights" and are forced to "continue pregnancies that put their lives at risk" due to restrictive abortion legislation.[357] The World Health Organization (WHO) has also outlined that legal, regulatory, and administrative barriers to abortion access contribute to unsafe abortion because they "deter women from seeking care and cause delays in access to services."[358]

An inevitable legal issue related to the right to life approach to abortion is whether or not a fetus or "the unborn" has a right to life. Certain States recognize a prenatal right to life and justify prohibitions on abortion and certain types of contraception on this basis.[359] In international human rights law, however, the invocation of claims to the right to life of the fetus has been largely ineffective. The Universal Declaration of Human Rights states that "all human beings are *born* free and equal in dignity and rights,"[360] and the *travaux preparatoires* indicate that the word "born" was used intentionally to confirm that the rights in the Declaration are "inherent from the moment of birth," thereby excluding a prenatal application of the rights protected in the Declaration.[361] Similarly, the *travaux preparatoires* of the International Covenant on Civil and Political Rights affirms that the right to life contained in Article 6 does not apply prior to birth.[362] The Convention on the Rights of the Child defines a "child" as "every human being below the age of eighteen years."[363] Its preamble acknowledges the child's need for special safeguards and care, including appropriate legal protection "before as well as after birth."[364] However, at the time of drafting, state delegations that included this

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[356] Human Rights Committee, General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, October 30, 2018, CCPR/C/GC/36 at ¶ 8 [hereinafter HRC, General Comment No. 36]; CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), March 29, 2000, CCPR/C/21/Rev.1/Add.10 at ¶ 10.

[357] Inter-American Commission on Human Rights, *On International Women's Day, IACHR Urges States to Guarantee Women's Sexual and Reproductive Rights* (March 6, 2015), http://www.oas.org/en/iachr/media_center/PReleases/2015/024.asp.

[358] World Health Organization, *Safe Abortion: Technical and Policy Guidance for Health Systems*, at 94.

[359] In 2012, Honduras' Supreme Court upheld the country's ban on emergency contraception based on the belief that it can harm a fertilized embryo – which is a misunderstanding of emergency contraception's mechanism of action. *See*, Decision of the Supreme Court, Feb. 1, 2012 (Hond.) [Dictamen de la CSJ, 1 de feb. de 2012 (Hond.)].

[360] Universal Declaration of Human Rights, adopted December 10, 1948, G.A. Res.217a (III), Article 1, U.N. Doc. A/810 (1948).

[361] U.N. GAOR 3rd Comm., 99th mtg., ¶ 110-124, U.N. Doc. A/PV/99 (1948).

[362] U.N. GAOR Annex, 12th Sess., Agenda Item 33, at 113 U.N. Doc. A/C.3/L.654 (1957); U.N. GAOR, 12th Session, Agenda Item 33, at 199(q), U.N. Doc. A/3764 (1957). The proposed and rejected text read, "the right to life is inherent in the human person from the moment of conception." For a contrasting view, see P.J. Flood, *Does International Law Protect the Unborn Child?*" 7(2) NATIONAL CATHOLIC BIOETHICS QUARTERLY, 73 (2007).

[363] Convention on the Rights of the Child (1989), Article 1.

[364] The phrase "before as well as after birth" was added as a result of a proposal by the Holy See, Ireland, Malta, and the Philippines. E/CN.4/L.1542, Commission of Human Rights, 36th session, 1980, ¶ 6.

language stated that it would not preclude the possibility of abortion because it was legal in many states under certain circumstances.[365]

Regional human rights instruments and their respective courts' jurisprudence support similar conclusions on the level of protection the right to life affords to the fetus. The Covenant on the Rights of the Child in Islam (CRCI)[366]—a binding convention which has not entered into force but was adopted in 2005 by the Organization of Islamic Cooperation's (OIC) Council of Foreign Ministers—is the most specific in terms of its protection for prenatal life. Article 7(a) reads, "as of the moment of birth, every child has rights due from the parents, society and the state to be accorded proper nursing, education, and material, hygienic and moral care. Both the fetus and the mother must be protected and accorded special care."

Article 4 of the American Convention on Human Rights (ACHR) protects "the right to life, in general, from the moment of conception."[367] However, in the *Baby Boy* case,[368] the Inter-American Commission on Human Rights (IACHR) drew on the preparatory works to the ACHR to assert that the drafters of the Convention did not intend for the phrase "in general, from the moment of conception" to mean that abortion should be outlawed under the Convention.[369] Accordingly, the Inter-American Court of Human Rights determined that embryos do not constitute persons under the convention and are not afforded an absolute right to life.[370]

In the 2004 case of *Vo v. France*[371], the Grand Chamber of the European Court of Human Rights avoided clarifying whether fetuses enjoy the right to life under Article 2 of the European Convention on Human Rights. The case

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[365] *Id.*

[366] Covenant on the Rights of the Child in Islam, OICDoc.OIC/IGGE/HRI/2004/Rep.Final. [hereinafter CRCI].

[367] American Convention on Human Rights, 9 I.L.M. 101 (1970) (OAS Doc. OEA/SER. K/XVI/1.1 Doc. 65 (1970)) [hereinafter American Convention) Negotiated at San Jose, Costa Rica in 1969, with the active participation of the United States, the American Convention is an international agreement that operates within the framework of the Organization of American States. Although the Convention was signed by President Jimmy Carter in 1978, it has yet to attain the two-thirds vote in the Senate the is required for ratification.

[368] Case 2141, Inter-Am. C.H.R. 25, OEA/ser.L/V/II.54, doc. 9, rev. 1, ¶ 1 (1981) (*White, Potter v United States*, commonly known as the Baby Boy Case). The case was essentially a challenge to *Roe v Wade* and *Doe v Bolton*. Following *Roe*, the State of Massachusetts reversed a manslaughter conviction against a doctor who had performed an abortion. This was challenged as a violation of the right to life under the Convention. For more, see Dinah Shelton, *Abortion and the Right to Life in the Inter-American System: The Case of Baby Boy*, 2 HUM. RTS. L.J. 309 (1979).

[369] Case 2141, Inter-Am. C.H.R. 25, ¶ 30 ("In the light of this history, it is clear that the... addition of the phrase 'in general, from the moment of conception' does not mean that the drafters of the Convention intended to modify the concept of the right to life that prevailed in Bogota, when they approved the American Declaration."). Nonetheless, in practice, the ACHR has been used nationally and locally in attempts to limit access to abortion. For example, conservatives in Argentina, while arguing against abortion in cases of rape or as the only possible means of preventing danger to the life or health of a woman, contended that the provision had become "prospectively unconstitutional" in light of the ACHR. See Paolo Bergallo, *The Struggle Against Informal Rules on Abortion in Argentina*, in ABORTION LAW IN TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES 147 (eds. Rebecca J. Cook, Joanna N. Erdman, and Bernard M. Dickens).

[370] *Artavia Murillo et al. ("In Vitro Fertilization") v Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., series C, No. 257, ¶ 264, 273 (November 28, 2012).

[371] *Vo v France*, 40 EHRR 12 (2005) at ¶ 80.

arose from a situation where, due to a mix-up at a French hospital, a doctor punctured the applicant's amniotic sack during a medical procedure that was meant for a different 'Mrs. Vo'. As a result, the applicant had to have a therapeutic abortion. The doctor responsible faced malpractice charges. Unsatisfied with this outcome, the applicant, supported in her application by anti-abortion doctors, complained to the European Court of Human Rights that France should have prosecuted the doctor for "unintentional homicide" rather than malpractice and that the state's failure to do so infringed upon the right to life of her fetus under Article 2 of the Convention. However, the Court held that there was no violation of Article 2. The majority concluded that "the unborn child is not regarded as a person directly protected by Article 2 of the Convention" and that if "the unborn" do have a right to life, it is limited by the mother's rights and interests.[372]

International law does not establish that protecting prenatal life is illegitimate, but it is clear that the state's duty to protect the woman's right to life has primacy over any fetal right to life.[373] In 2011, the CEDAW Committee affirmed this in the case of *L.C. v. Peru.*[374] In that case, a public hospital refused to provide surgery to a child, in part because she was pregnant, and the hospital wished to prevent harm to the fetus.[375] The CEDAW Committee confirmed that protecting the fetus over the health of the mother was a human rights violation.[376] Similarly, in 2007, the Inter-American Commission on Human Rights issued precautionary measures[377] to Nicaragua, requiring the state to provide medical care to a pregnant girl who had been denied cancer treatment because her doctors were concerned that the treatment could provoke an abortion.[378]

2. *The right to health*

There are numerous formulations of the right to health in international human rights treaties. Article 12(1) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) enshrines the seminal international human rights law articulation of the right to health. It "recognizes the right of everyone to the enjoyment of the highest attainable

[372] *Id.* ¶ 80 and 82. This was also indicated in *A, B, and C v Ireland*, supra *note* 10.
[373] For a contrary view, *see generally*, Thomas Finegan, *International Human Rights Law and the "Unborn": Texts and Travaux Preparatory,* 25 TUL. J. INT'L & COMP. L. 89, 121 (2016).
[374] *LC v. Peru*, CEDAW Committee Communication No. 22/2009, UN Document CEDAW/C/50/D/22/2009 (2011) [hereinafter *LC v. Peru*].
[375] *Id.* ¶ 2.1–2.4, ¶ 30-31.
[376] *Id.*
[377] Article 25 of the Commission's Rules of Procedure establishes the mechanism for precautionary measures. In serious and urgent situations, the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures to prevent irreparable harm to persons or to the subject matter of the proceedings in connection with a pending petition or case.
[378] MC 43-10 – "Amelia", Nicaragua (February 26, 2010).

standard of physical and mental health.[379] Article 24 of the CRC provides that States must "recognize the right of the child to the enjoyment of the highest attainable standard of health." Article 12(1) of CEDAW obliges states to "take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."[380] Article 25 of the Convention on the Rights of Persons with Disabilities and Art. 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination also articulate the right to health.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),[381] a binding multilateral treaty at the African regional level that came into force in 2005 is a rarity amongst human right treaties in expressly enjoining States to ensure the access to abortion in order to protect women's health. Under Article 14(2)(c) of the Protocol, the right to health, States Parties are called upon to take all appropriate measures to

> protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus.

In clarifying States' obligations under Article 14(2)(c) of the Maputo Protocol, the African Commission calls on States, in General Comment 2,[382] to adopt a purposive interpretation of grounds for abortion similar to the WHO Technical Guidance on abortion.[383] Drawing on this guidance means that where "mental health" is relied upon as grounds for abortion, it is not necessary for States to establish psychiatric evidence first.[384] The WHO's definition of health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity" is also adopted, potentially enabling a broad interpretation of grounds for abortion, to include

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[379] International Covenant on Economic, Social and Cultural Rights, (entered into force January 3, 1976) art 12(1). This followed the Universal Declaration of Human Rights in 1949, which affirms that 'everyone has the right to a standard of living adequate for the health and wellbeing of himself [or herself] and of his [or her] family, including food, clothing, housing, medical care, and necessary social services. Universal Declaration of Human Rights, UN Doc A/810 (December 10, 1948) art 25(1).

[380] Convention on the Elimination of All Forms of Discrimination against Women, opened for signature December 18, 1979, 1249 UNTS 13 (entered into force September 3, 1981) art 12(1).

[381] Adopted by the 2nd Ordinary Session of the Assembly of the Union, A.U. Doc. CAB/LEG/66.6 (September 13, 2000).

[382] African Commission on Human and Peoples' Rights. General Comment No 2 on Article 14 (1) (a), (b), (c) and (f) and Article 14 (2) (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the African Commission on November 28, 2014.

[383] *Id.* ¶ 10.

[384] *Id.* ¶ 38.

socio-economic reasons.[385] The General Comment calls on States to remove restrictions that are not necessary for providing safe abortion services, such as the requirements of multiple signatures, approval by committees before an abortion can be performed, or restricting the performance of abortion to only medical practitioners.[386]

More generally, the right to health in international law includes a prohibition on discrimination in the access to healthcare. Article 2 of the ICESCR provides that Covenant rights should be exercised "without discrimination of any kind," including on grounds of sex, race, and socioeconomic status. Article 3 requires States to "ensure the equal right of men and women to the enjoyment of all economic, social, and cultural rights …. [in the Covenant]." The right to health—along with other economic, social, and cultural rights—must be progressively realized according to available resources, but the right to non-discrimination is of immediate effect in human rights law and cannot be restricted.[387] The CEDAW Committee has clarified that discrimination in access to health can occur not only when there is a difference in treatment between men and women but also *indirectly* when services used only by women, including reproductive healthcare, are neglected.[388] The World Health Organization advises that countries permitting abortion on health grounds should interpret "health" to mean "complete physical, mental and social well-being and not merely the absence of disease or infirmity."[389]

The negative health effects of abortion restrictions are evident in any country or region with restrictive laws or other barriers on the access to abortion. As outlined in the previous section, criminal bans and cumbersome regulations on abortion access—particularly in the Global South—lead women to obtain abortion procedures in unsafe circumstances. Every year, close to five million women suffer from temporary or permanent disability as a consequence of unsafe abortion.[390] Though laws restricting access rarely lead to lower rates of abortion,[391] research in the US has shown that regulations seeking to prevent women from accessing abortion have been

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[385] *Id.* ¶ 7, ¶ 38.
[386] *Id.* ¶ 58.
[387] Committee on Economic, Social and Cultural Rights, General Comment 3, "The nature of State Parties' obligations" (Art. 2, ¶ 1 of the Covenant), U.N. Doc. E/1991/23, 1990, ¶ 9.
[388] UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 24: Article 12 of the Convention (Women and Health), ¶15, 31 (U.N. Doc. A/54/38/Rev.1, chap. 1) (April 20, 1999),
[389] World Health Organization, Constitution of the World Health Organization, at 1 (45th ed. 1949).
[390] World Health Organization, *Safe Abortion: Technical and Policy Guidance for Health Systems*, World Health Organization (2015) http://apps.who.int/iris/bitstream/handle/10665/173586/WHO_RHR_15.04_eng.pdf;jsessionid=64E5FCC0E3763E34CA2B0CF9C2395646?sequence=1.
[391] Gilda Sedgh, et al, *Induced Abortion: Incidence and Trends Worldwide From 1995 to 2008*, THE LANCET 379, No. 9816 (2012): 625-632; World Health Organization, *Safe Abortion: Technical and Policy Guidance for Health Systems* 23 (2012).

marginally effective in some States,[392] and that carrying an unwanted pregnancy to term can threaten a woman's health.[393] On the other hand, thousands of women circumvent local restrictions by traveling to regions that offer safe and legal access; Irish women traveled to the UK, Polish women go to Germany, and women and girls from States such as Georgia, Kentucky, Mississippi, Texas, Ohio or Missouri in the USA travel as far as New York. As the phenomenon of abortion travel has gained more attention, studies have reported that travel can have negative mental health impacts on women[394] and creates long-term social inequities that may influence health outcomes.[395] Additionally, criminal abortion restrictions that are unclear have been shown to have chilling effects on healthcare providers, to the point that providers may refuse to provide abortions even when it is legal.[396] Criminal provisions on abortion also present barriers to other reproductive health services, including during pregnancy and childbirth; hospitals have denied women abortions even when their lives are threatened by the pregnancy, including in the context of miscarriage.[397] In Nicaragua[398] and the Dominican Republic[399] for example, state and non-state actors have denied cancer treatment to women because of the potential harm that the treatment could do to the fetus. In a number of countries that criminalize abortion, women who have miscarried their pregnancies have delayed seeking medical treatment out of fear — usually well-founded— that they will be legally punished for purposefully inducing.[400]

Conceptualizing access to reproductive healthcare as part of the right to health is a relatively recent development in international human rights law.[401] In the early 1990s, UN agreements reflecting States' political commitments (as opposed to express legal obligations) on international development

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[392] *See, e.g.,* DIANA GREENE FOSTER, THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION.

[393] Caitlin Gerdts, et al. *Side effects, physical health consequences, and mortality associated with abortion and birth after an unwanted pregnancy*, 26 WOMEN'S HEALTH ISSUES 55 (2016).

[394] Aiken, *Online Telemedicine supra* note 6.

[395] World Health Organization, *Safe Abortion: Technical and Policy Guidance for Health Systems*, *supra* note 384, at 90.

[396] *See e.g., Tysiac v. Poland*, 45 Eur. Ct. H.R. 42 (2007) [hereinafter *Tysiac v. Poland*].

[397] Report of the UN Working Group on the issue of discrimination against women in law and in practice, UN Doc. A/HRC/32/44 (2016) ¶ 79; CEDAW Concluding Observations: El Salvador (2017) ¶ 36(a).

[398] *See, e.g.,* "Amelia," Precautionary Measures MC 43-10, Inter-Am. Comm'n HR, (2010), http://www.oas.org/en/iachr/women/protection/precautionary.asp; see also, *Anti-Abortion Law Kills Dominican Teenager*, CTR. FOR REPROD. RES., http://www.reproductiverights.org/press-room/dominican-republic-teenager-dies-abortion-ban (last visited June 8, 2015); Rafael Romo, *Pregnant Teen Dies After Abortion Ban Delays Her Chemo Treatment for Leukemia*, CNN, (August 18, 2012), http://www.cnn.com/2012/08/18/world/americas/dominican-republic-abortion/.

[399] *See, e.g.,* Amnesty International, *The Total Abortion Ban in Nicaragua - Women's Lives and Health Endangered, Medical Professionals Criminalized*, 1, 8 (2009) https://perma.cc/Y7GK-RDCZ.

[400] *See* Centre for Reproductive Rights, *Marginalized, Persecuted And Imprisoned, The Effects Of El Salvador's Total Criminalization Of Abortion* (2014) https://reproductiverights.org/sites/default/files/documents/El-Salvador-CriminalizationOfAbortion-Report.pdf.

[401] *See* Ronli Sopris, *Restrictive Abortion and the Right to Health,* 18 (2) MED. L. REV. 193, 196.

introduced 'reproductive rights' to the human rights lexicon.[402] Academics, policymakers, and advocates consider three such political commitments — the 1994 Cairo International Conference on Population and Development (ICPD), its resulting Cairo Program of Action,[403] and the 1995 Fourth World Conference on Women in Beijing[404] — as representing a "paradigm shift" in this regard.[405] Prior international population growth and development policies addressed women's reproductive needs as an issue of population growth; access to contraception was embraced by governments on the grounds that it could reduce the birth rate. By contrast, in these new population commitments, participating governments endorsed "reproductive health" as a *right*.[406] The ICPD report described reproductive rights as:

> the basic right of all couples and individuals to decide freely and responsibly the number, spacing, and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health.[407]

The momentum for recognizing women's reproductive rights, however, did not extend to abortion rights at this juncture. Notably, the Holy See led a group of Latin American States, Malta, and some OIC countries in a successful campaign to exclude abortion access from the concept of 'reproductive rights' and from classification as a health service or method of fertility regulation.[408] This bloc of UN Members framed abortion as a threat to national values, both religious and cultural, and successfully inserted guarantees within the ICPD declaring that "in no case should abortion be promoted as a method of family planning" and that legal or policy changes on abortion access could only be determined nationally.[409] In turn, the only

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[402] While international consensus documents are non-binding, the statements contained in these documents are persuasive and indicative of the world community's support for reproductive health and can be used to support legislative and policy reform, as well as interpretations of national and international law.

[403] United Nations, Report of the Internat'l Conference on Population and Development, UN Doc. No. A/CONF.171/13, Sept. 1994, ¶¶ 8.25 [hereinafter ICPD Programme of Action]

[404] Platform for Action of the Fourth World Conference on Women, UN Doc. A/CONF.177/20 [hereinafter, *Beijing Platform*].

[405] *See*, *e.g.,* MICHELLE ROSENBERG, THE MEANS OF REPRODUCTION; Alicia Yamin, *Transformative Combinations: Women's Health and Human Rights,* JOUR. OF THE AMERICAN MEDICAL WOMEN'S ASSOCIATION 52, (1997) 172. WHO, *Sexual and reproductive health beyond 2014: Equality, Quality of Care and Accountability*, http://apps.who.int/iris/bitstream/handle/10665/112291/WHO_RHR_14.05_eng.pdf;jsessionid=4F9F95179F5FD66B733EB4296D1B0AD1?sequence=1.

[406] The ICPD report defined "reproductive health" broadly as: "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes." ICPD Programme of Action, *supra* note 397, at ¶ 7.2; *See generally*, Mindy Jane Roseman, *Bearing Human Rights: Maternal Health and the Promise of ICPD*, in REPRODUCTIVE HEALTH AND HUMAN RIGHTS: THE WAY FORWARD 91, 108 (Laura Reichenbach & Mindy Jane Roseman eds., 2009).

[407] ICPD Programme of Action, *supra* note 398, at ¶ 7.3.

[408] Elisabeth Jay Friedman, *Gendering the agenda: the impact of the transnational women's rights movement at the UN conferences of the 1990s,* 26 WOMEN'S STUDIES INTERNATIONAL FORUM, 313, 322 (2003).

[409] ICPD Programme of Action, *supra* note 397 ¶ 8.25.

consensus that States reached on providing abortion access was "the Cairo compromise," an affirmation that where abortion is legal, it should be safe, and where illegal, women should have access to quality post-abortion care.[410] The following year, the Beijing Platform asked States to "consider reviewing laws containing punitive measures against women who have undergone illegal abortions"[411] but went no further. While the ICPD introduced public health aspects of unsafe abortion to the UN agenda for the first time, abortion could not yet be treated as a legitimate reproductive health service. Rather, it was something to be prevented. [412]

In the years that followed, the CEDAW and CRC Committees became vocal about the negative health consequences of abortion restrictions for women and girls,[413] but the Committees hesitated to require that States liberalize their domestic abortion law to comply with human rights obligations. In 1999, the CEDAW Committee issued General Recommendation No. 24 on Women and Health in which it echoed the ICPD's endorsement of reproductive health rights to clarify that "access to health care, including reproductive health, is a basic right under the Convention."[414] The Committee did not, however, assert that abortion denial or its criminalization violated the right to reproductive health. It recognized the link between maternal mortality and unsafe abortion but only asked States to amend legislation criminalizing abortion "when possible."[415] Furthermore, the country-specific sections within the report from the same session expressed concerns about high levels of abortion in Greece, indicating that the Committee did not consider abortion as part of the reproductive health services they promoted.[416] In 2000, the CESCR Committee's General Comment No. 14. articulated that "sexual and reproductive health services, including access to family planning, pre-and post-natal care, [and] emergency obstetric services," must be provided as part of the right to health,[417] but like CEDAW, the CESCR Committee did not expressly recognize legal access to

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[410] *Beijing Platform supra* note 898 at ¶ 8.25. *See also*, Marge Berber, *The Cairo "Compromise" on Abortion and its Consequences for Making Abortion Safe and Legal*, in REPRODUCTIVE HEALTH AND HUMAN RIGHTS: THE WAY FORWARD 152–59 (Laura Reichenbach & Mindy Jane Roseman eds., 2009).

[411] *Id.* at ¶ 106(k).

[412] *See generally*, Johanna Fine et al., *The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally*, HEALTH, AND HUMAN RIGHTS 69, 70 (highlighting the contradiction between stating concern for "unsafe abortion" but not calling states to reform their laws to permit abortion in spite of despite clear evidence that this is essential for reducing unsafe abortion).

[413] *See, e.g.,* Concluding Observations of CEDAW regarding Belize, July 1, 1999, A/54/38 at ¶ 56; Colombia, February 5, 1999, A/54/38 at ¶ 393; and Dominican Republic, May 14, 1998, A/53/38 at ¶ 337.

[414] Committee on the Elimination of Discrimination against Women, General Recommendation No 24: Women and Health (Article 12), 20th session, UN Doc A/54/38/Rev.1 (1999) [hereinafter, CEDAW General Recommendation No. 24.]

[415] *Id.* Art 31(c).

[416] CEDAW, Report of the Committee on the Elimination of Discrimination Against Women, including General Recommendation 24, Supplement No. 38 A/54/38/Rev.1 3–7 (1999).

[417] Committee on Economic, Social and Cultural Rights, General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12), 22nd session, UN Doc E/C.12/2000/4 (August 11, 2000) ¶ 14; Committee on the Rights of the Child, *Concluding Observations on Chad*, CRC/C/15/Add.107 (1999), ¶ 30.

abortion as part of the right to health.

The CEDAW Committee received its first communication involving abortion denial in the case of *L.C. v. Peru.*[418] A 13-year old girl was raped by her uncle, and when she discovered that she was pregnant, she threw herself from the roof of a building.[419] She survived and was taken to hospital, where her doctors recommended immediate realignment of her spine to prevent permanent paralysis.[420] The surgeon in the hospital refused to perform the surgery because of LC's pregnancy and what he considered to be risks to the fetus.[421] LC was subsequently diagnosed with serious depression, but her medical team refused to provide anti-depressives on the grounds of her pregnancy.[422] LC and her mother then requested an abortion for LC, which she was entitled to under Peruvian law owing to the risk to her health,[423] and they tried to reschedule LC's surgery.[424] The hospital refused to provide an abortion and did not perform the surgery until LC miscarried three months later.[425] The delay dramatically diminished the success of the intervention, and LC became paralyzed from the neck down.[426]

LC complained to the CEDAW Committee that the state's failure to provide for a therapeutic abortion violated her right to non-discrimination in access to healthcare under Article 12.[427] Emphasizing that LC was a minor and a victim of sexual abuse, the CEDAW Committee agreed that Peru had violated her right to health under Article 12 by not ensuring she received the healthcare that her medical condition required—both the surgery and the abortion.[428] Crucially, LC was entitled to this healthcare under national law. As such, the precedent is limited because LC's circumstances fell within the state's own legal limits for abortion access.

Following a global study on reproductive and sexual rights, in 2011, the UN Special Rapporteur on the Right to Health, Anand Grover, pushed the norm further and articulated that the criminalization of abortion could violate the right to health.[429] And for the first time, a UN expert recommended that all States decriminalize abortion to protect the right to health.[430] Almost concurrently, in 2011, the CEDAW Committee became less tentative in its criticisms of national abortion laws and their impact on

[418] *LC v. Peru*, *supra* note 374.
[419] *Id.* ¶¶ 2.1–2.4.
[420] *Id.*
[421] *Id.*
[422] *Id.*
[423] *Id.* ¶ 8.12.
[424] *Id.* ¶ 8.12.
[425] *Id.* ¶¶ 2.9–2.11.
[426] *Id.* ¶ 8.18.
[427] *Id.* ¶ 3.3.
[428] *Id.* ¶ 8.15.
[429] UN General Assembly, Interim Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc A/66/254, August 3, 2011.
[430] *Id.* ¶ 65 (h).

women's right to health.[431] The heightened burdens that criminal abortion laws impose on marginalized women and girls, such as women with poor socio-economic resources, asylum seekers, and migrant women, was a key theme of this criticism.[432]

By 2016, the CESCR Committee included access to abortion as part of the right to reproductive health for the first time in the Committee's corpus.[433] General Comment 22 on the right to sexual and reproductive health outlines that "States must reform laws that impede the exercise of the right to sexual and reproductive health including laws criminalizing abortion."[434] The Committee also delineated that respect for the right to health requires States to prevent unsafe abortions, including to "liberalize restrictive abortion laws; to guarantee women and girls access to safe abortion services and to quality post-abortion care."[435] Additionally, the CESCR Committee recognized the pernicious nature of the intersectional discrimination that impacts women living in poverty, people with disabilities, migrants, adolescents, and people living with HIV/AIDS when such persons seek reproductive healthcare.[436]

The CEDAW Committee's 2015 *Statement of the Committee on the Elimination of Discrimination Against Women on sexual and reproductive health and rights: Beyond 2014 ICPD* sums up its interpretation of abortion as a human rights issue:

> Unsafe abortion is a leading cause of maternal mortality and morbidity. As such, States parties should legalize abortion at least in cases of rape, incest, threats to the life and/or health of the mother, or severe fetal impairment, as well as provide women with access to quality post-abortion care, especially in cases of complications resulting from unsafe abortions. States parties should also remove punitive measures for women who undergo abortion. States parties should further organize health services so that the exercise of conscientious objection does not impede their effective access to reproductive health care services, including abortion and post-

[431] *See, e.g.*, Committee on the Elimination of Discrimination Against Women, *Concluding Observations Oman*, ¶41, U.N. Doc. CEDAW/C/OMN/CO/1 (2011); Committee on the Elimination of Discrimination Against Women, Concluding Observations: Paraguay, ¶31, U.N. Doc. CEDAW/C/PRY/CO/6 (2011).
[432] *See, e.g.,* Committee on the Elimination of Discrimination Against Women, Concluding Observations: Ireland, CEDAW/C/IRL/CO/6-7 (2017) ¶8.1.
[433] Committee on Economic, Social and Cultural Rights, General Comment No. 22, Right to Sexual and Reproductive Health, UN Doc. E/C.12/GC/22. 2016. In its general comment No. 14 (2000) on the right to the highest attainable standard of health, the Committee did not include abortion access as part of its definition of reproductive health, which it said means "that women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice as well as the right of access to appropriate healthcare services that will, for example, enable women to go safely through pregnancy and childbirth."
[434] *Id.* ¶ 45.
[435] *Id.* ¶¶ 28, 56-57.
[436] *Id.*

abortion care.[437]

The CEDAW Committee applied such standards in its 'Country Inquiry' of Northern Ireland.[438] Though abortion has been permitted in England, Wales, and Scotland since 1958, until recently, Northern Ireland criminalized abortion in all cases other than when the life of the woman was threatened or where the fetus would not survive to term. Invoking the right to health as recognized in Article 12, the CEDAW Committee recommended that Northern Ireland decriminalize abortion in all situations and legalize abortion at least in cases of incest, rape, fetal impairment and when there is a threat to the life or health of the woman.[439]

In recent years, the Committee on the Rights of the Child has similarly urged States to "decriminalize abortion in all circumstances" to safeguard a girl's right to health.[440] Additionally, in August 2018, the CRPD Committee issued a 'joint statement' with CEDAW asserting that "access to safe and legal abortion, as well as related services and information, are essential aspects of women's reproductive health."[441]

At the regional human rights level, through the mechanism of 'precautionary measures,'[442] the Inter-American Court and Commission have recognized that abortion access (though not by name, instead preferring to describe it as medical treatment) can be necessary to protect a women's right to health, as recognized in Article 10 of the Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. El Salvador's near-total ban on abortion led to the measures issued in

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[437] CEDAW Statement of the Committee on the Elimination of Discrimination Against Women on Sexual and Reproductive Health and Rights: Beyond 2014 ICPD review https://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/SRHR26Feb2014.pdf.

[438] Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination CEDAW/C/OP.8/GBR/1. The CEDAW committee can initiate 'Country Inquiries' if they receive "reliable and legitimate" information of severe or systematic violations of their convention in a member state. against Women.

[439] *Id.*

[440] Committee on the Rights of the Child, *Concluding Observations: Ireland*, ¶ 58(a), U.N. Doc. CRC/C/IRL/CO/3-4 (2016); Committee on the Rights of the Child *Concluding Observations: Kuwai*t (2013) ¶ 60; Committee on the Rights of the Child *Concluding Observations: Sierra Leone* (2016), ¶32(c); Committee on the Rights of the Child *Concluding Observations: United Kingdom of Great Britain and Northern Ireland* (2016), ¶ 65(c).

[441] Joint statement by the Committee on the Rights of Persons with Disabilities (CRPD) and the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) *Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities* (August 29, 2018).

[442] Article 25 of the Rules of Procedure of the IACHR establishes that, in serious and urgent situations, the Commission may, on its own initiative or at the request of a party, "request that a State adopt precautionary measures. Such measures, whether related to a petition or not, shall concern serious and urgent situations presenting a risk of irreparable harm to persons or to subject matter of a pending petition or case before the organs of the inter-American system." The measures may be of a collective nature to prevent irreparable harm to persons due to their association with an organization, a group, or a community with identified or identifiable members. https://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp.

B v. El Salvador[443] by the Inter-American Court. A 22-year old mother who was pregnant with an anencephalic fetus sought an abortion when her physician told her that carrying her pregnancy to term would exacerbate her lupus and cause life-threatening obstetric complications.[444] Though *B*'s request for an abortion was within the permitted exceptions to El Salvador's abortion ban, state authorities intervened to prevent her from getting an abortion. In response to B's petition for the Inter-American Court to intervene, the Court ordered El Salvador to ensure that "appropriate medical procedures" were carried out to preserve B's life, health, and personal integrity.[445] In doing so, the Court addressed the case solely as a question of providing medical treatment for B and avoided any assessment of the compatibility of El Salvador's abortion ban with the Convention. By contrast, the Special Rapporteur on Women's Rights in the Inter-American system has expressly named therapeutic abortion as a necessary health service for women, the denial of which constitutes a violation of human rights.[446]

By invoking the right to health to call for the decriminalization of abortion, international and regional human rights bodies have taken important steps beyond the UN political commitments made in the 1990s. By contrast, global health and international development policies on reproductive health remain ambivalent on abortion rights. These policies and practices remain bound by the ICPD and its abortion compromise: where abortion is legal, it should be safe, and where illegal, women should have access to quality post-abortion care.[447] The 2030 Agenda for Sustainable Development, for example, includes the target of "universal access to sexual and reproductive health and reproductive rights," but the target is limited to ensuring sexual and reproductive rights as recognized in the ICPD, the Beijing Platform for Action and the 'outcome documents' of their review conferences.[448] The most recent review of Beijing Platform in 2019 committed to striving for "access to safe abortion to the full extent of the law, measures for preventing and avoiding unsafe abortions, and for the provision of post-abortion care."[449] – thereby remaining bound by the 1994

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[443] Order of the Inter-American Court of Human Rights of May 29, 2013: Provisional Measures with Regard to El Salvador, Matter of B., at 14, ¶17, Inter-Am Ct. H.R. (2013), http://www.corteidh.or.cr/docs/medidas/B_se_01_ing.pdf.

[444] *Id.* ¶ 9.

[445] *Id.* ¶ 4(ii)(c).

[446] Letter dated November 10 2006, from Victor Abramovich of the Inter-American Commission on Human Rights and Santiago A. Canton to Norman Calderas Cardenal, Nicaraguan Minister of Foreign Affairs.

[447] *See also*, Lisa Pizzarossa *Here to Stay: The Evolution of Sexual and Reproductive Health and Rights in International Human Rights Law* (3) MDPI 29, (2018) (arguing that even prominent sexual and reproductive health rights advocates did not push beyond the 1994 ICPD agreement in their demands in the decades following the agreement).

[448] United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development*, adopted by the UN General Assembly in September 2015, contains Goal 3 (Ensure healthy lives and promote wellbeing for all at all ages) and Goal 5 (Achieve gender equality and empower all women and girls).

[449] *See, e.g., Nairobi Statement on ICPD25: Accelerating the Promise*, ¶ 3 https://www.nairobisummiticpd.org/content/icpd25-commitments (including the commitment to strive for:

compromise on abortion. Similarly, in the WHO's 2016-2030 "Global Strategy for Women's, Children's and Adolescents' Health"—an evidence-based strategy "designed to ensure that every woman and child realizes their right to health"—the interventions on abortion are limited to providing post-abortion care and safe abortion where it is already legal.[450]

3. *The right to decide freely on the number and spacing of children*

As mentioned, other than the Maputo Protocol, no regional or international human rights treaty explicitly addresses abortion. The CEDAW, where one may expect to find a provision on abortion, does not, but it includes several provisions on family planning; these include Articles 10(h), 12(1), and 14(2). Relatedly, Article 16(1)(e) of CEDAW calls on States to ensure that men and women have "the same rights to decide freely and responsibly on the number and spacing of their children, and to have access to the information, education, and means to enable them to exercise these rights."[451] However, the family planning provisions have never been interpreted to support access to abortion, and Article 16(1)(e) only once.[452] Similarly, Article 23(1) of the Convention on the Rights of all Persons with Disabilities (CRPD) recognizes "[t]he rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children."[453] but this provision has not been interpreted to support abortion rights.

4. *The right to privacy*

In the landmark 1973 US Supreme Court case, *Roe v. Wade*,[454] the right to abortion was recognized as a fundamental right included within the guarantee of personal privacy.[455] The decision had a global impact; it inspired movements for and against the liberalization of abortion laws across the world. This Supreme Court's judicial reasoning, which considered abortion a matter of privacy rights, also reverberated in jurisdictions around the globe. The European Court of Human Rights was one such importer. Strasbourg jurisprudence treats Article 8, the right to private and family life, as the main

access to safe abortion to the full extent of the law, measures for preventing and avoiding unsafe abortions, and for the provision of post-abortion care:).

[450] The Global Strategy for Women's, Children's and Adolescents' Health (2016-2030) http://www.who.int/life-course/partners/global-strategy/globalstrategyreport2016-2030-lowres.pdf.

[451] United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, Article 16(1)(e).

[452] There is one exception with regards to the CEDAW Committee. In its 2018 Country Inquiry in Northern Ireland, the Committee held that the UK had violated the right to Article 16(1)(e) due to its failure to decriminalize abortion in Northern Ireland. See, *Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, CEDAW/C/OP.8/GBR/1 at ¶72. This was the first time that Article 16(1)(e) was interpreted by the CEDAW to include abortion access.

[453] Article 23(1) Convention on the Rights of Persons with Disabilities, G.A. res. A/61/611 (2006).

[454] 410 U.S. 113 (1973).

[455] *Id.* ¶ 153.

provision pertinent to claims for access to abortion under the Convention. Article 8 guarantees "respect for private and family life" and provides that this right may not be interfered with "except such as is in accordance with the law and is necessary . . . in the interests of . . . the protection of health or morals, or for the protection of the rights and freedoms of others." Decisions related to the right to private life at the European Court of Human Rights have recognized that the right incurs both negative and positive obligations; the state may need to refrain from interfering in private life, or it may have to act by taking measures to safeguard access. Additionally, the Court has also asserted that privacy includes, among other things, the right to personal identity or personal autonomy, a right to establish and develop relationships with others, a right to moral and physical integrity, and the "right to become or not become a parent."[456] Though such interests appear to support a woman's right to abortion, in contrast to American jurisprudence, the European Court does not consider the right to privacy to protect a woman's right to abortion.

The first case to address abortion rights in the European Convention on Human Rights was *Brüggemann and Scheuten v. Federal Republic of Germany*[457] in 1977. Two applicants claimed that Germany's criminalization of abortion in the first trimester, other than in exceptional cases, violated their right to respect for private life, and in the case of Scheuten, a single mother with two children, her right to respect for family life.[458] In claiming a violation of private life, the applicants argued that the German law demanded that they either forego sexual intercourse or use contraceptive methods that may be unreliable, unhealthy, or unavailable[459] and that the law could force women "to carry out pregnancy against [their] will."[460] The applicants also invoked Articles 9, 11, 14, 17, and 18 of the Convention, but all of those claims were dismissed without interrogation by the Commission.[461]

The Commission asserted that legislation "regulating the termination of pregnancy" engaged privacy interests under Article 8(1) and described the right to private life as encompassing rights to sexual autonomy.[462] and the right to physical and psychological integrity.[463] However, according to the (now defunct) Commission, a woman's private life becomes "shared" with the fetus whenever she is pregnant.[464] Consequently, the Commission held that

[456] *Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-IV); *Tysiac v Poland supra* note ¶ 107.
[457] *Bruggemann and Scheuten v. Federal Republic of Germany*, App No. 6959/75, (1981) 3 E.H.R.R. 244 /3 Eur. Comm'n H.R. 244, (1981) [hereinafter *Bruggemann v. Germany]*.
[458] *Id.* ¶ 50.
[459] *Id.*
[460] *Id.*
[461] *Id.* ¶ 51.
[462] *Id.* ¶¶ 61–63.
[463] *Id.*
[464] *Id.* ¶ 59.

the German law did not interfere with the applicants' private life.[465] The Commission also emphasized that all member states of the Convention, in one way or another, set up their own legal rules in this area.[466] The commission alleged that parties to the Convention did not intend to bind themselves in favor of any particular position on abortion rights.[467]

The case of *Tysiac v. Poland* was the first abortion access human rights challenge at the European Court of Human Rights. Alicja Tysiac had sought an abortion in Poland upon being told that her pregnancy constituted a risk to her eyesight (she had severe myopia).[468] Because Poland's abortion ban includes exceptions for abortions where there is a risk to a woman's life or health, where the pregnancy is a result of a crime, or where the pregnancy cannot survive to term,[469] Tysiac's abortion was legal. However, her doctors would not perform the abortion for her; they claimed that if she delivered by cesarean, the risk could be averted. Unable to get an abortion, Tysiac delivered her pregnancy by cesarean. A few months later, her eyesight deteriorated to the point that she could no longer care for her children.[470] She initiated a criminal case against her doctors, but the Polish courts dismissed the case. She then turned to the European Court of Human Rights.

Tysiac argued that Poland violated her right to private life both substantively—by failing to provide her with a legal therapeutic abortion—and procedurally—by failing to provide a comprehensive legal framework that could guarantee her legal right to a therapeutic abortion.[471]

The European Court of Human Rights focused its assessment on Alicja Tysiac's procedural claim.[472] The Court held that the right to private life required Poland to ensure proper procedures to allow women to exercise their *domestic* abortion rights. Emphasizing that it was not creating "abortion rights," the Court outlined that "once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it,"[473] — a responsibility that extended to protecting

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[465] *Id.* at ¶ 66. There was, however, a dissent. Mr. J. E. S. Fawcett disagreed with the Commission's conclusion regarding Article 8 and argued that the intervention of the German law in sexual morality had not been justified by the state. He opined that regulation of abortion invades article 8(1) rights not only during pregnancy but before conception since it will influence a woman's decision regarding its commencement and termination. Mr. T. Opshal, with Mr. C. Norgaard and Mr. L. Kellberg, concurring, issued a separate opinion in which they argued that the state had intervened in the applicants' private life but that this was not an *interference* because the intervention was justified.

[466] *Id.*

[467] *Id.*

[468] *Tysiac v. Poland*, Eur. Ct. H.R. No. 5410/03 (2007) [hereinafter, *Tysiac v. Poland*].

[469] Law on Family Planning (protection of the human fetus and conditions permitting pregnancy termination) Statute Book 93.17.78 (1993 Act).

[470] *Tysiac v. Poland, supra* note 468 at ¶15.

[471] *Id.* at ¶¶ 67, 75-76.

[472] *See* Joanna Erdman, *The Procedural Turn: Abortion at the European Court of Human Rights*, in ABORTION LAW IN TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES 121 (Rebecca J. Cook, Joanna Erdman & Bernard Dickens eds., 2014).

[473] *Tysiac v. Poland, supra* note 468 at ¶ 105-6.

against medical obstructiveness. There the Court ended its review, avoiding discussion of the claims that Poland's abortion law, in and of itself, interfered with Alicja Tysiac's human rights.[474]

In *RR v. Poland*,[475] a public hospital delayed genetic testing for the applicant after ultrasounds indicated a severe impairment in the fetus—grounds for termination of pregnancy in Poland—until the legal time limit for abortion expired.[476] In finding a violation of *RR's* right to private life, the Court articulated that "effective access to relevant information on the mother's and fetus' health, where legislation allows for abortion in certain situations, is directly relevant for the exercise of personal autonomy."[477] Drawing on its holding in *Tysiac*, the Court concluded that, where domestic law allows for abortion in cases of fetal malformation, the state has a positive obligation under Article 8 to ensure that there is "an adequate legal and procedural framework to guarantee that relevant, full and reliable information on the fetus' health is available to pregnant women."[478]

In *P & S v. Poland*,[479] a 14-year-old girl (P) became pregnant after she was raped by a classmate.[480] P's situation fell within one of Poland's exceptions to its abortion ban, i.e., rape, and her mother (S) approached several hospitals seeking a referral for an abortion. Still, a series of medical personnel invoked "conscientious objection" and would not refer P to another provider.[481] The hospitals then pressured P to sign a statement that she did not want an abortion, and state authorities removed P from the custody of her mother, falsely claiming that P was being pressured by her mother. [482] The hospitals also released P's information to the press and Catholic anti-abortion groups.[483]

P ultimately obtained an abortion, but the European Court held Poland responsible for the delay and obstruction. Relying on the right to private life, the Court reiterated that when abortion access is permitted, the state is obligated to put in place a "procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion."[484] The

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[474] *Id.* ¶ 116.
[475] *R.R. v. Poland*, No. 27617/04, Eur. Ct. H.R., (2012) [hereinafter, *R.R. v. Poland*].
[476] Section 4(a) of the Polish 1993 Family Planning Act provides: "An abortion can be carried out only by a physician where 1) pregnancy endangers the mother's life or health; 2) prenatal tests or other medical findings indicate a high risk that the fetus will be severely and irreversibly damaged or suffering from an incurable life-threatening ailment; 3) there are strong grounds for believing that the pregnancy is a result of a criminal act." Under any circumstances, it is only possible to obtain an abortion before the 23rdweek of pregnancy (when the baby would be able to survive outside the mother's body).
[477] *R.R. v. Poland, supra* note 475 at ¶177.
[478] *Id.* at ¶ 200.
[479] *P & S v. Poland*, No. 57375/08, Eur. Ct. H.R. (2012) [hereinafter, *P & S. v. Poland*].
[480] *Id.* at ¶¶ 11–15.
[481] *Id.*
[482] *Id.* at ¶¶19, 26, 28, 32.
[483] *Id.* at ¶41.
[484] *Id.*

Court specified that exceptions to the criminalization of abortion must be transparent, and the regulatory framework must include appropriate appeals processes to satisfy the right to private life:[485]

> once the state, acting within its limits of appreciation, adopts statutory regulations allowing abortion in some situations, . . .the legal framework devised for this purpose should be shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention.[486]

The Court followed a similar approach in the 2010 case of *A, B & C v. Ireland* (already discussed in this dissertation in chapter 1) concerning three women who went to the UK for abortions owing to Ireland's almost total ban on abortion.[487] The first applicant, A, was a recovering alcoholic with four children in the care of the state.[488] She had suffered from post-natal depression after each of her four prior pregnancies, which had exacerbated her alcoholism. She felt that a fifth child could impede her progress in becoming sober and reuniting with her family and so decided to get an abortion.[489] She borrowed money at a high interest rate to pay for travel and a private clinic in the UK, and she traveled in secret.[490] The second applicant, B, was young and single and felt that she could not care for a child on her own. She also traveled to the UK in secret.[491] The third applicant, C, who was in remission from cancer, tried to find out from her doctors whether her pregnancy would impact her health and whether the radiation from her recent cancer tests might have harmed the fetus.[492] Neither her doctor nor other healthcare workers were forthcoming. Having researched the risks herself, she decided to travel to the UK for an abortion. Upon return to Ireland, she suffered prolonged bleeding and infection as consequences of incomplete abortion.[493]

All three applicants submitted that Ireland's abortion prohibition violated their human rights under Article 3 (prohibition of inhuman and degrading treatment), 8 (right to respect for private life), and 14 (prohibition of discrimination) of the European Convention. Applicant C also claimed that

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[485] *Id.*
[486] *R.R. v. Poland*, *supra* note 475 at ¶ 187; *P & S v. Poland*, *supra* note 479 at ¶ 99; See also, *Tysiac v. Poland*, *supra* note 468 at ¶ 116; *A, B, and C. v. Ireland*, supra *note 12* at ¶ 249.
[487] *A, B, & C v. Ireland*, supra *note 12*.
[488] *Id.* ¶ 13
[489] *Id.* ¶¶ 13-17.
[490] *Id.*
[491] *Id.* ¶¶ 18-21.
[492] *Id.* ¶¶ 24-26.
[493] *Id.* ¶¶ 23-26.

her right to life under Article 2 (right to life) had been violated, arguing that abortion was not available in practice in Ireland even in a life-threatening situation (the one possible legal exception to the ban) because there was no legislation or guidelines to clarify that a woman had a right to a life-saving abortion).[494] In relation to the right to private life, all three applicants argued that Ireland failed to respect their physical integrity, and the stigma, delay, and stress they had suffered by being forced to travel secretly to England for abortions infringed upon their right to private life.[495] C also claimed that the state's lack of a statutory or regulatory basis for a life-saving abortion violated her right to private life.[496]

The Irish government contested all of their claims and argued that even if Article 8 was engaged, Ireland's abortion ban was a justified interference with the right to private life because it pursued two legitimate aims: a) the law advanced the protection of the rights of 'others,'[497] and b) it was based on public morals and the need to protect the right to life of the fetus.[498]

In relation to all three applicants, the Grand Chamber asserted that Ireland's prohibition on abortion impacted their private lives.[499] The Chamber did not engage C's right to life claims but found in her favor on privacy grounds, reiterating its previous position that, where abortion is legally permitted, the state has a positive obligation to ensure that it is accessible.[500] But with respect to applicants A and B, the Court's majority held that the state's interference with their private lives was justifiable; the Court accepted Ireland's claim that the normative premise of abortion restrictions in Ireland was "the profound moral views" of the Irish people on the protection of prenatal life, i.e. the second proffered legitimate aim.[501] The Chamber also assessed whether the prohibition on abortion was proportionate to the state's aim by considering whether Ireland had:

> struck a fair balance between, on the one hand, the first and second applicants' right to respect for their private lives under Article 8 and, on the other, the profound moral values of the Irish people as to the nature of life, and consequently as to the need to protect the life of the unborn.[502]

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[494] *Id.*
[495] *Id.* ¶ 167-178.
[496] *Id.* ¶ 128.
[497] *Id.* ¶ 181.
[498] *Id.* ¶ 182.
[499] *Id.* ¶ 214, 216.
[500] *Id.* ¶ 263-264.
[501] *Id.* ¶ 227.
[502] *Id.* ¶ 230. The "margin of appreciation" is a judicial principle that the European Court developed as a form of ethical decentralization to national authorities. The Court gives states a margin to decide how to balance the state's protection for a fundamental right and its's protection of public interest. For more, see Eval Benvenisti, *Margin of Appreciation, Consensus and Universal Standards*, 31(4) NYU J. INT'L L. POL. 843, 843–854, (1999).

In determining whether this balance was met, the Court afforded the Irish government a wide "margin of appreciation"[503] and the claims of A and B were dismissed.[504]

At the UN level, the right to privacy in abortion jurisprudence at the Human Rights Committee produces similarly tentative support for abortion access. Many cases replicate the European Court's approach, i.e., the Committee will find States in violation of the right to privacy if their abortion regulation is not implemented in practice. *KL v. Peru*[505] challenged Peru's failure to implement a woman's right to a therapeutic abortion. When she was three months pregnant, KL, then aged 17, attended a public hospital in Lima for an ultrasound, which revealed that she was carrying a fetus with a fatal anomaly where the fetus lacks most or all of a forebrain. Her gynecologist told KL that her life was in danger if the pregnancy continued.[506] KL opted to have a therapeutic abortion, which is legal in Peru, but the hospital's director refused. As a result, KL gave birth to an anencephalic newborn and suffered from severe depression when the newborn died four days after she gave birth.[507]

KL complained to the HRC that is interfering with her decision to legally terminate her pregnancy and subjecting her to an "extended funeral" for her child; the state acted on the basis of prejudicial social attitudes towards women to violate her rights under Articles 3 (non-discrimination between men and women), 6 (life), 7 (torture and ill-treatment), 24 (the right of every child to receive from her family, society and the state the protection required by her status as a minor) and 26 (equal protection of the law) of the ICCPR.[508] In terms of the violation of her right to privacy, KL argued that by interfering with her decision to have an abortion—a decision that impacted her bodily integrity and her life more broadly—the state violated her right to privacy.[509]

The Committee found in favor of KL, but on a different basis. Rather than engaging her argument that the state interfered with a woman's right to make autonomous decisions about reproduction or parenthood, the Committee held that the "state interfered arbitrarily in her private life by denying her the opportunity to secure medical intervention."[510]

LMR v. Argentina[511] involved a girl who was pregnant as a result of rape. Argentina permits abortion for victims of rape, but the hospital that LMR

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[503] K.L. v. Peru, CCPR/C/85/D/1153/2003, Communication No. 1153/2003 [hereinafter *K.L. v. Peru*]
[504] *Id.*
[505] *Id.*
[506] *Id.* ¶¶ 2.1—2.2.
[507] *Id.* ¶¶ 2.3 & 2.6.
[508] *Id.* ¶¶ 3.4-3.7.
[509] *Id.*
[510] *Id.* ¶ 6.4.
[511] *LMR v. Argentina*, UN Doc. CCPR/C/101/D 1608/2007, (UN Human Rights Committee Apr 28, 2011).

attended initiated legal proceedings to prevent her from getting an abortion.[512] Following a series of appeals, the Supreme Court of Buenos Aires determined that LMR could get an abortion, but the hospital again refused to perform the abortion on grounds of "institutional conscience."[513] With the help of local women's organizations, LMR obtained an illegal abortion on the "black market."[514] LMR suffered from post-traumatic stress disorder in the aftermath.[515]

LMR's mother complained to the HRC that the hospital's refusal to terminate the pregnancy violated her human rights,[516] including her right to be free from arbitrary interference in her private life.[517] She emphasized that the state arbitrarily interfered in her private life by making a decision concerning her life and reproductive health on her behalf.[518] In response, the Committee held that Argentina's unlawful interference—through the judiciary—in an issue that should have been resolved "between the patient and her physician" violated LMR's right to privacy.[519]

In *Mellet v. Ireland*[520] and *Whelan v. Ireland*,[521] the applicants' argued that Ireland's abortion ban in cases of non-viable pregnancies impeded their physical and psychological integrity and arbitrarily interfered in their decision-making.[522] In response, the HRC concluded that by interfering with their decision not to continue a non-viable pregnancy and causing mental anguish, Ireland interfered with their right to privacy.[523] In contrast to the European Court of Human Rights, the HRC held that: "the balance that the state party has chosen to strike between protection of the fetus and the rights of the woman cannot be justified."[524]

There are no abortion-related decisions involving the right to privacy from the Inter-American Court of Human Rights. However, in 2007, the Inter-American Commission of Human Rights brokered a friendly settlement in *Paulina del Carmen Ramírez Jacinto v. México*. [525] Paulina, 13, was pregnant as

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[512] *Id.* ¶¶ 2.3—2.7.
[513] *Id.* ¶ 3.16.
[514] *Id.* ¶ 2.7.
[515] *Id.*
[516] LMR made four additional claims against Argentina; (i) the state subjected LMR and her family to physical and mental suffering in violation of the right to be free from torture, or CIDT under Article 7; (ii) Argentina put LMR's right to life under Article 6 at risk by forcing her to obtain an illegal abortion (iii) Argentina violated Article 18 (the right to freedom of religion or belief) owing to an abuse of conscientious objection and (i) the state's failure to exercise due diligence in safeguarding the legal right to a procedure required solely by women, resulted in discriminatory treatment in violation of Article 3 of the ICCPR.
[517] *Id.* ¶¶ 3.4–3.8.
[518] *Id.* ¶ 3.2.
[519] *L.M.R. v. Argentina*, *supra* note 511, ¶ 9.3.
[520] *Mellet v. Ireland*, *supra* note, ¶ 7.8.
[521] *Whelan v. Ireland*, *supra* note ¶ 7.7.
[522] *Id.* ¶ 3.4. *Mellet v. Ireland*, *supra* note ¶ 3.4;
[523] *Mellet v. Ireland*, ¶ 7.7; *Whelan v. Ireland*, ¶ 7.8.
[524] *Id.*
[525] *Paulina del Carmen Ramírez Jacinto v. México*, Inter-American Commission on Human Rights, Friendly Settlement, Petition 161-02, Report No. 21/07 (2007).

a result of rape. At the hospital she attended, Paulina's medical team purposely delayed her abortion.[526] A Catholic priest and anti-abortion hospital director began visiting Paulina as she waited, providing both Paulina and her mother misleading information about the health risks of abortion. Worried, Paulina canceled the abortion. Her petition to the Commission alleged that the state had enabled public officials to violate her rights to dignity and privacy, physical and psychological integrity, liberty, and informed consent in its failure to issue guidelines for access to abortion for women who have been raped.[527]

Paulina's case never reached the admissibility stage at the Inter-American Commission of Human Rights; Paulina and the State of Mexico reached a "friendly settlement agreement," in which the Mexican government conceded generally to the human rights violations and agreed to a number of reparations.[528] Similar to cases in the European Court of Human Rights, the judicial approach distilled the issues to focus on procedure, namely the absence of regulations to clarify the exceptions to Mexico's abortion ban. There was no examination of the abortion ban *itself* or the broader socio-political context that gave rise to a situation where individuals could impose their religious beliefs about abortion on a woman.[529]

5. *The right to be free from cruel, inhuman, and degrading treatment*

The prohibition of torture and cruel, inhuman, and degrading treatment (CIDT) is a norm of universal applications in international law[530] and is one of the most prolific norms contained in international and regional human rights treaties.[531] There is no single definition of torture under international law, but international human rights bodies tend to agree upon four elements that, if combined, constitute torture.

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[526] *Id.* ¶¶ 9–13.

[527] Article 11, American Convention and Article 7, American Convention.

[528] The reparations included monetary compensation for education and school supplies; psychological treatment and health services for the victim; a public acknowledgment of responsibility by the government in the local newspapers; changes to legislature; an assessment of the enforcement of the National Program for the Prevention and Attention of Domestic, Sexual and Violence Against Women; the dissemination of a circular from the Health Secretariat to other sectors that would serve to 'strengthen the commitment toward ending violations of the right of women to the legal termination of a pregnancy. *Paulina del Carmen Ramírez Jacinto v. México*, Inter-American Commission on Human Rights, Friendly Settlement, Petition 161-02, Report No. 21/07 (2007).

[529] Ciara O'Connell, *Litigating Reproductive Health Right in the Inter-American System: What Does a Winning Case Look Like?* (Special Issue on Health Rights Litigation), 16 HEALTH AND HUMAN RIGHTS J. 116, 121 (2014).

[530] *See, e.g.*, Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331. *See generally*, Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens,* 34 YALE J. INT'L L. 331, 331. (2009).

[531] Torture and other forms of ill-treatment are prohibited under, inter alia: Article 7 of the International Covenant on Civil and Political Rights; the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984); Article 37 of the Convention on the Rights of the Child; Article 10 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990; Article 15 of the Convention on the Rights of Persons with Disabilities, G.A. res. A/61/611 (2006); Article 5 of the American Convention on Human Rights; Article 3 of the European Convention on Human Rights; Article 5 of the African Charter on Human and Peoples' Rights.

I. an act (or omission) that inflicts severe pain or suffering
II. which is intentional
III. for a specific purpose or for any reason based on discrimination of any kind, and
IV. inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[532]

In distinguishing torture from CIDT, the UN Special Rapporteur on Torture and Ill-Treatment asserts that the concept of "powerless[ness]" is "the decisive criteria" for distinguishing torture from cruel, inhuman, and degrading treatment.[533] In contrast, the European Court of Human Rights defines torture as inhuman treatment that is both deliberate and "caus[es] very serious and cruel suffering." The Court considers inhuman or degrading treatment to be conduct that, while still serious, falls below that threshold.[534]

The form of torture and CIDT traditionally accepted as prohibited under international human rights law required that the perpetrator be "a public official or other person acting in an official capacity," e.g., official detention settings, during interrogations, or armed conflict.[535] This right would protect "the male prisoner of conscience."[536] Torture and ill-treatment inflicted upon women by either state or non-state actors wasn't part of the picture.[537] However, over the past thirty years, feminist activists transformed understandings of torture and CIDT in international law such that pain and suffering endured by women are also understood as a violation of the right to be free from torture and ill-treatment.[538] Rape now has been found to constitute torture in some circumstances[539] and categories of gender-based

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[532] *See also*, Article 1 UNCAT.
[533] Special Rapporteur on torture and other cruel, inhuman, and degrading treatment, U.N. E/CN.4/2006/6 (2005), ¶ 39.
[534] *Ireland v. United Kingdom*, Eur. Ct. H.R. No. 5310/71, ¶ 167 (1978).
[535] The UNCAT specifies that to qualify as torture or other cruel, inhuman, or degrading treatment, the pain or suffering must be inflicted at the instigation, or with the consent or acquiescence, of a public official or other person acting in an official capacity. However, the prohibition on torture and ill-treatment in the ICCPR applies regardless of whether the acts were committed by "public officials" or "other persons acting on behalf of the State," or "private persons" and "whether by encouraging, ordering, tolerating or perpetrating prohibited acts." HRC, General Comment No. 20, 1992, §13.
[536] *See, e.g.*, Clare McGlynn, *Rape as 'Torture'? Catherine Mackinnon and Questions of Feminist Strategy*, 16(1) FEMINIST LEGAL STUDIES, 71,75 (2008).
[537] *See, e.g.*, RONLI SOPRIS, REPRODUCTIVE FREEDOM, TORTURE AND INTERNATIONAL HUMAN RIGHTS: CHALLENGING THE MASCULINISATION OF TORTURE 19–23 (2014) [hereinafter RONLI SOPRIS, REPRODUCTIVE FREEDOM]; Catharine MacKinnon, *On Torture: A Feminist Perspective on Human Rights*, 21, in KATHLEEN MAHONEY AND PAUL MAHONEY (EDS.), HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE (1993); Rhona Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, (1994) 25 COLUM. HUM. RTS. LAW REVIEW 291.
[538] *See* Hilary Charlesworth, Christine Chinkin & Shelley Wright; *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 628–30 (1991); Center for Reproductive Rights, *Reproductive Rights Violations as Torture and Cruel, Inhuman or Degrading Treatment or Punishment: A Critical Human Rights Analysis* (2011) https://reproductiverights.org/document/reproductive-rights-violations-as-torture .
[539]Aydin v. Turkey, Eur. Ct. H.R. No. 23718/94 (1997) (acknowledging for the first time that an act of rape could constitute torture); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (1998). *See generally*, Alice Edwards, *The Feminizing" of Torture under International Human Rights Law*, 19(2) LEIDEN J. INT'L L. 349 (2006).

non-state torture such as female genital cutting, widow and acid burning, and the torture of "trafficked" women are emerging.[540]

At national, regional, and international levels, civil society organizations extensively document the ways in which state denial of abortion rights can generate suffering at the hands of the state that constitutes torture or other cruel, inhuman, or degrading treatment.[541] In response to such monitoring, documentation, and advocacy, the Human Rights Committee, the Committee Against Torture (CAT),[542] and the European Court of Human Rights have articulated that denial of access to abortion can lead to physical or mental suffering amounting to ill-treatment. Alyson Zuerick identifies two broad situations where this occurs.[543] The first involves cases where actors, such as medical professionals, hospital boards, or police, frustrate or obstruct a woman's attempts to obtain an abortion that she is legally entitled to.[544] The second and more recent branch of this abortion denial-as-ill-treatment jurisprudence involves cases where human rights bodies find that a State's abortion regulations *themselves* cause the ill-treatment.[545]

Beginning in the late 1990s, the UN Human Rights Committee, through its General Comments and Concluding Observations to States, expressed its concern restrictive abortion laws could run afoul of their obligations to prevent torture or CIDT, particularly when the pregnancy was the result of rape or the woman's life was threatened.[546] Over the next decade, the Committee substantiated its reasoning on abortion denial as ill-treatment in individual decisions.

The above-discussed case *KL v. Peru,*[547] in 2005, was the first in a series of cases where the HRC found that denying or obstructing a woman's access to an abortion amounted to CIDT. The Committee recognized that the mental suffering that KL experienced, both during her pregnancy and after giving birth, was a foreseeable result of the hospital compelling her to continue with the pregnancy even though KL's child would die very soon after birth.[548] This

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[540] *See, e.g.,* UN Special Rapporteur on torture and other cruel, inhuman, and degrading treatment, E/CN.4/2006/6 (2005), ¶ 35.

[541] *See, e.g.,* Aya Fujimura-Faneslow, *The state as a catalyst for violence against women: Violence against women and torture or other ill-treatment in the context of sexual and reproductive health in Latin America and the Caribbean*, AMNESTY INTERNATIONAL, https://www.amnesty.org/download/Documents/AMR0133882016ENGLISH.PDF.

[542] The UN Committee against Torture (CAT Committee) interprets and ensures compliance with the UN Convention against Torture.

[543] Alyson Zureick, (*En)gendering Suffering: Denial of Abortion as a Form of Cruel, Inhuman, or Degrading Treatment*, 38 FORDHAM INT'L L.J. 99, 137 (2015).

[544] *Id.* ¶140.

[545] *Id.*

[546] *See, e.g.,* Human Rights Comm., General Comment No. 28, *supra* note 3, ¶ 11 (noting that in assessing a State's compliance with Article 7 of the ICCPR, the Committee would examine whether States provided access to safe abortion for women who became pregnant as a result of rape); Human Rights Comm., Concluding Observations to Peru, ¶ 20, U.N. Doc. CCPR/CO/70/PER (2000) (observing that the criminalization of abortion is incompatible with Article 7 of the ICCPR and recommending that Peru revise its abortion law)

[547] *KL v. Peru*, supra note 503.

[548] *Id.* ¶ 6.3.

was compounded because her medical team provided no psychological or medical support despite KL's "special vulnerability as a minor girl."[549] The Committee held that this suffering amounted to CIDT for which Peru was liable.[550]

In *LMR v. Argentina,*[551] LMR's mother claimed that forcing her daughter to continue with her pregnancy constituted cruel and degrading treatment and, consequently, was a violation of her personal well-being.[552] LMR also claimed that she felt humiliated by the barrage of attention she had received, in particular the pressure from people to continue the pregnancy and give the baby up for adoption.[553] In addressing the author's claim, the Committee held that Argentina's failure "to guarantee LMR's right to a termination of pregnancy [as provided under domestic law] . . . caused LMR physical and mental suffering" amounting to a violation of Article 7.[554] The Committee also expressed heightened concern at what they perceived to be the vulnerability of the complainant, that LMR's suffering was "aggravated by her status as a young woman with a disability."[555]

In 2014, in its Concluding Observations to Ireland, the HRC, citing Article 7 of the Convention, expressed its concern that Ireland continued to prohibit abortion in most circumstances and highlighted the "severe mental suffering caused by the denial of abortion services to women seeking abortions due to rape, incest, fatal fetal abnormality or serious risks to health."[556] The Committee concluded by recommending that Ireland undertake significant reforms, namely that it "[r]evise its legislation on abortion, including its Constitution, to provide for additional exceptions in cases of rape, incest, serious risks to the health of the mother, or fatal fetal abnormality" to comply with its obligations under the ICCPR.[557] When this law was subject to the Committee's scrutiny in two landmark cases just two years later, the Committee unambiguously held that criminal abortion law *in and of itself*, i.e., not just obstruction of the law, violated the right to be free from cruel, inhuman and degrading treatment.

As discussed in Chapter 1, the cases of *Mellet* and *Whelan* shared a similar factual background. During their pregnancies, both Amanda Mellet and Siobhán Whelan received diagnoses of fatal fetal impairments (congenital heart defects in the case of Mellet and holoprosencephaly in the case of

[549] *Id.* ¶ 6.5.
[550] *Id.* ¶ 6.5.
[551] *LMR v. Argentina*, *supra* note 511, ¶ 7.2.
[552] *Id.* ¶ 3.8.
[553] *Id.*
[554] *Id.* ¶ 9.2.
[555] *Id.*
[556] Human Rights Comm., Concluding Observations to Ireland, ¶ 9, U.N. Doc.CCPR/C/IRL/CO/4 (2014).
[557] *Id.*

Whelan).[558] At the time, Ireland only permitted abortion in situations where there was a risk to the life of the woman, which meant that the women had to leave Ireland, at their own expense, in order to end their non-viable pregnancies. In Mellet's situation, she had to return to Ireland twelve hours after her abortion — still weak and bleeding — because she could not afford to stay overnight in the UK.[559] Upon return, neither woman received post-abortion or bereavement care in the public health care system. In addition, the women described deep feelings of shame and stigma associated with the criminalization of abortion.[560] Both women had to leave the remains of their child in the UK to be received later via delivery by courier.[561]

In their separate cases, Amanda Mellet and Siobhan Whelan claimed that Ireland subjected them to cruel, inhuman, and degrading treatment by i) denying them reproductive health care and bereavement support; (ii) forcing them to continue carrying a dying fetus; iii) compelling them to terminate their pregnancies abroad; and iv) subjecting them to intense stigma.[562] Ireland attempted to refute these claims by pointing out that the Committee's CIDT holding in the *KL* case was due to KL being denied an abortion that was *lawfully* available. [563] By contrast, Mellet and Whelan had sought abortions that were unlawful in Ireland.

The HRC found in favor of the women. It held that by forcing the women to leave the country for abortions in such circumstances — away from their families and local healthcare providers, and with the burden of having to leave the remains of their babies behind — Ireland's abortion law subjected the women to "intense physical and mental suffering" that violated their right to be free from cruel, inhuman and degrading treatment.[564] Finding that Ireland's abortion law *itself*, rather than a failure to implement the law, amounted to a human rights violation, marked significant progress in the Human Rights Committee's abortion jurisprudence. The decisions required Ireland, for the first time, to compensate a woman for the expenses and emotional distress tied to an abortion. It also called on Ireland to amend its laws criminalizing abortion in cases of fatal fetal anomaly, including its constitution, if necessary.

While the Committee Against Torture has not heard an individual case on access to abortion, there are a number of very clear concluding observations by the Committee on abortion restrictions. CAT reiterates that restrictive abortion laws may lead to suffering tantamount to CIDT and urges

[558] *Mellet* at ¶¶ 2.1-2.2; *Whelan* at ¶ 2.1.
[559] *Mellet v Ireland*, ¶ 2.4.
[560] *Mellet v Ireland*, ¶ 2.5; *Whelan v Ireland*, ¶ 2.4.
[561] *Mellet v Ireland*, ¶ 2.5; *Whelan v Ireland*, ¶ 2.5.
[562] *Mellet v Ireland*, ¶ 3.1; *Whelan v Ireland*, ¶ 3.1.
[563] *Mellet v Ireland*, ¶ 4.6; *Whelan v Ireland*, ¶ 4.5.
[564] *Mellet v Ireland*, ¶ 7.4 - 7.6; *Whelan v Ireland*, ¶7.5 -7.7

States to reform their abortion laws as part of their obligation to prevent CIDT.

The European Court of Human Rights has been more reticent than the Human Rights Committee to recognize claims for ill-treatment in abortion cases. In *A, B, C v. Ireland*, the applicants argued they had experienced inhuman or degrading treatment because Ireland's criminalization of abortion stigmatized women who sought abortions. It was "degrading and a deliberate affront to their dignity."[565] The Court considered this claim to be "manifestly ill-founded" and thus inadmissible.[566] Similarly, in the above mentioned *Tysiac* case, the applicant claimed that the state's failure to ensure she could access her right to an abortion—essentially forcing her to continue with a pregnancy knowing that her health could seriously deteriorate—resulted in "anguish and distress" and amounted to inhuman or degrading treatment under Article 3.[567] The Court dismissed Tysiac's claim without explicit reason.[568]

In two cases, a couple of years later, the European Court went further than it had in *Tysiac*. In the abovementioned case of *RR v. Poland*,[569] the European Court concluded that the public hospital's deliberate delay in providing the legal genetic testing had both humiliated RR and caused her severe mental anguish. In combination with the woman's "extreme vulnerability" as a pregnant woman, the abortion denial constituted a violation of the right not to be subjected to inhuman and degrading treatment.[570] Similarly, in *P & S v. Poland*[571] the barriers that state actors had subjected her to in her attempt to obtain an abortion—one that she was entitled to under Polish law—violated her right to be free from cruel, inhuman, and degrading treatment.[572]

The response of the European Court in *RR* and *P & S* emulates the approach of its privacy-based abortion access jurisprudence just discussed. The Court is willing to recognize human rights violations in situations where state actors frustrate a woman or girl's access to abortion, but only if she was already legally entitled to that abortion under national law. Unlike the HRC's move to recognize that it is the national law itself that produces the ill-treatment, the European Court avoids censuring national legal restrictions on abortion.

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[565] *See, e.g., A, B, & C v Ireland, supra* note 8, ¶ 162-163
[566] *Id.*
[567] *Tysiac v. Poland*, *supra* note 468 at ¶ 65.
[568] *Id.* at ¶ 66.
[569] *R.R. v. Poland*, *supra* note,
[570] *Id.* ¶ 200.
[571] *P & S v. Poland*, *supra* note 479.
[572] *Id.* ¶ 162.

6. *The right to equality and non-discrimination on the basis of sex and gender*

All international human rights law treaties offer protection for the right to non-discrimination and to equality, but the formulations differ. Article 26 of the ICCPR, which outlines that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination"[573] is the oldest self-standing general right to non-discrimination in international law. Article 3 of the ACHPR, Article 24 of the ACHR, and Protocol 12 to the ECHR similarly recognize a freestanding right to equality before the law for all persons.

Article 2(1) of the ICCPR establishes the treaty's prohibition against discrimination, proscribing "distinctions of any kind," including race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status, in the exercise of any rights promulgated by the Covenant. Explicitly including a right to be free from indirect discrimination, the Human Rights Committee's General Comment No. 18 defines discrimination as that "which has the purpose or *effect* of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."[574] Similar accessory provisions against discrimination, including discrimination based on sex, can be found in most other human rights instruments, including the ICESCR, CRC, the IMWC, the ICRPD, and the UN Declaration on the Rights of Indigenous Peoples.[575]

Gender-specific protections for equality are found in Article 3 of the ICCPR, which requires States to ensure the equal right of men and women to all civil and political freedoms in the treaty and throughout the CEDAW. States are obligated to modify or abolish existing laws and policies which constitute discrimination against women. The CEDAW's equality standard requires all laws that disparately impact women to be scrutinized to secure *de jure* and *de facto* equality for women.[576] Additionally, both the UNCRPD and CEDAW Convention contain express obligations on States to eliminate harmful gender stereotypes as part of the States' obligations to ensure equality.[577]

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[573] Art. 26 provides: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status."

[574] Human Rights Committee, *General Comment No. 18*

[575] Convention on the Rights of the Child [hereinafter CRC], art. 2, 1577 U.N.T.S. 3 (Nov 20, 1989); International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, [hereinafter CRPD], G.A. res. 61/106, art. 23(1)(b), Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49, entered into force May 3, 2008, Article 4.

[576] Discrimination against women under CEDAW Convention means "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." Article 1, CEDAW.

[577] CEDAW Article 5(a); Article 8(1)(b) of the CRPD.

Surprisingly, the CEDAW Committee does not invoke the Convention's general prohibition on discrimination against women to address abortion restrictions. Instead, the Committee focuses its assessment of restrictive abortion laws under Article 12, which requires States to "take all appropriate measures to eliminate discrimination against women in the field of health care." Using this approach, the Committee has recognized that "criminalizing services that only women need,"[578] violates women's right to health under CEDAW and has urged States to reform their laws on this basis.

In *LC v. Peru,* the aforementioned case where a hospital refused to provide spinal surgery to a girl because she was pregnant, while also denying her a therapeutic abortion (that was legal in her circumstances), LC claimed that she had suffered discriminatory treatment based "on the stereotype of imposing the reproductive function of LC above her welfare" in violation of Article 5 of CEDAW — the Convention's anti-stereotyping provision.[579] Article 5 requires state parties to take measures aimed at "the elimination of prejudices based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."[580] The CEDAW Committee agreed that LC had been discriminated against per Article 5, but in quite confusing reasoning, articulated that LC had been denied surgery based on "the stereotype that protection of the fetus should prevail over the health of the mother."[581]

By contrast, in the Country Inquiry of Northern Ireland in 2018, the CEDAW Committee took a much more substantive approach to gender discrimination and abortion denial. The Committee invoked Article 2 (requiring the elimination of laws which constitute discrimination against women), as well as the right to health in Article 12, and the right to sexual health and family planning in Article 16, when noting that States parties are required to legalize abortion, at least in cases of rape, incest, threats to the life and/or physical or mental health of the woman, or severe fetal impairment.[582] Additionally, the Committee held that the UK's "deliberate maintenance of criminal laws on abortion" in Northern Ireland violated women's right to non-discrimination by perpetuating gender-based violence.[583] The Committee also noted that the failure to combat stereotypes depicting women primarily as mothers exacerbates discrimination against

[578] *See infra*
[579] *LC v. Peru*, *supra* note 374.
[580] *Id.* ¶ 3.3.
[581] *Id.* ¶ 11.3.
[582] CEDAW/C/OP.8/GBR/1, Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, ¶ 60.
[583] *Id.* ¶ 72.

women.[584]

The Human Rights Committee gave short shrift to the non-discrimination claims in its first abortion case, *KL. v Peru*. It declared complaints under Articles 3 (equal enjoyment of convention rights) and 26 (equality before the law) of the ICCPR to be inadmissible, stating that they had not been "properly substantiated" because the petitioner had not "provided any evidence relating to the events which demonstrated discrimination."[585] However, the Committee did find a violation of Article 2(3) of the ICCPR, the right to an effective remedy,[586] confirming that "the State's failure to exercise due diligence in safeguarding the legal right to a procedure required solely by women resulted in discriminatory treatment."[587]

In *L.M.R. v. Argentina*, the applicant claimed that the state's failure to exercise due diligence in safeguarding her *already legal* access to an abortion under Argentina's rape exception violated her right to equality and non-discrimination on the basis of sex; she asserted that she had had a legal right to a procedure "required solely by women."[588] She underscored that the Committee itself had expressed concern about traditionalist attitudes impacting women's rights in Argentina and emphasized that her treatment by health professionals and judges, as well as the authorities' failure to implement the law, had all been motivated by gender-based prejudice that was discriminatory.[589] The Human Rights Committee accepted her claim that she had not been provided with access to an effective remedy in relation to Article 3 (equal right of men and women to other rights) but did not provide any analysis as to why it considered that LMR's right to non-discrimination had been violated.

As described in the preceding section, in the cases of *Mellet* and *Whelan*, the applicants argued that Ireland's criminalization of abortion in cases of fetal impairment violated their human rights by denying their dignity, autonomy, and physical and psychological integrity.[590] The women argued

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[584] CEDAW/C/OP.8/GBR/1, Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (2018) ¶ 72.

[585] *K.L. v. Peru*, *supra* note 503 at ¶ 11.1

[586]Article 2 (3) off the ICCPR outlines that: Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative, or legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

[587] *K.L. v. Peru*, *supra* note 503at ¶ 11.1.

[588] *L.M.R. v. Argentina*, *supra* note 511, at ¶ 3.5-3.6.

[589] *Id.*

[590] *Mellet* at ¶ 3.9; *Whelan* at ¶ 3.9. See also, Isaac Stanley-Becker, *How an Irish-American woman's legal case helped spur Ireland's abortion referendum* THE WASHINGTON POST (May 17, 2018) https://www.washingtonpost.com/world/europe/how-an-irish-american-womans-legal-case-helped-spur-irelands-abortion-referendum/2018/05/16/c84e506e-4d7a-11e8-85c1-9326c4511033_story.html

that Ireland imposed no restrictions on health services "that were needed only by men," as such, the state's abortion ban discriminated against them on the basis of sex.[591] In addition, the women raised the structural and pervasive character of discrimination as a concern; Ireland's law stereotyped them as reproductive instruments whose needs were subordinate to those of the unborn, non-viable fetus.[592]

In its decision, the Committee made a point of saying that it "noted" these structural equality claims, but it took a different doctrinal approach. In its analysis, the Committee examined how Ireland treated the applicants as women who decided to terminate their non-viable pregnancies, in comparison to the treatment of women who had non-viable pregnancies but decided to carry the fetus to term.[593] The latter set of women could continue to receive the full protection of the public health system in Ireland, and all their medical needs, including post-natal and bereavement care, were covered by health insurance.[594] The applicants who decided to abort had to travel abroad at their own expense and were deprived of any care from the public health care system.[595]

In a confusing conclusion, the Committee located its non-discrimination finding under Article 26, allegedly on the basis of sex, on the grounds that the Irish legal system imposed disproportionate socio-economic burdens on some women but not on other women, depending on whether they abort or carry to term a non-viable fetus.[596] Prof. Sarah Cleveland provided a concurring opinion that articulated alternative bases for the finding of discrimination in *Mellet* and *Whelan*. She supported the claimant's argument that the criminalization of abortion is sex-based discrimination because it affects a health service that only women need and places no equivalent burden on men.[597] Additionally, she emphasized that Ireland's abortion law disproportionately impacted low-income and vulnerable populations because these women faced huge burdens in traveling for reproductive healthcare.[598] Most critically for Cleveland, the ICCPR's right to equal protection against gender discrimination prohibited the gender stereotyping the applicants complained of. Focusing on the women's claim that they had suffered discrimination on the basis of gender stereotyping, Cleveland outlined that requiring women to carry a fatally impaired pregnancy to term underscored the extent to which Irish law has "prioritized (whether intentionally or

[591] *Id.*
[592] *Mellet* at ¶ 3.10; *Whelan* at ¶ 3.11.
[593] *Mellet* at ¶ 7.1; *Whelan* at ¶ 7.1.
[594] *Id.*
[595] *Mellet* at ¶ 7.1; *Whelan* at ¶ 7.1.
[596] *Id.* ¶ 7.11.
[597] *Mellet*, Annex II, ¶ 5.
[598] *Mellet*, Annex II, ¶ 14.

unintentionally) the reproductive role of women as mothers."[599] The state's claim that the law had a non-discriminatory purpose, i.e., protection of the unborn in line with the constitution, did not mean that "its laws may not also be informed by such stereotypes."[600] Cleveland asserted that a law animated by a gender stereotype of women as mothers amounts to discrimination against women under Article 26.

Article 14 of the European Convention on Human Rights, like Article 2(1) of the ICCPR, provides protection for the enjoyment of the rights and freedoms in the Convention "without discrimination on any ground such as sex, race, color, language, ….or other status."[601] In the abortion jurisprudence of the European Court of Human Rights, a number of the applicants claimed, under Article 14, read with Articles 3 (freedom from cruel, inhuman and degrading treatment) or 8 (the right to private life), that they had been discriminated against on grounds of sex and gender. But in all cases, discrimination was barely considered or was summarily dismissed without discussion.[602] In *RR*, although the claimant included a sex discrimination claim in the pleadings, it never appeared among the claims considered by the Court.[603] In *P&S*, the applicant's claim under Article 14 was dismissed as inadmissible, and no reasoning was offered to explain the dismissal. In *ABC*, all three women argued that the domestic restrictions on abortion disproportionately burdened them as women and amounted to a violation of the right to non-discrimination on the basis of sex.[604]A in *ABC* also sought to claim discrimination based on socio-economic status, given the greater difficulties that she faced, as a woman with few financial resources, in traveling to England for an abortion.[605] The majority again declined to address abortion as an issue of non-discrimination. Similarly, in *Tysiac*, the Court gave no explanation for why it did not address the applicant's equality claims; Ms. Tysiac had argued that Poland's failure to reasonably accommodate her disability during the investigations amounted to discrimination on the ground of her disability and that her treatment had been driven by sexism.[606]

The foregoing jurisprudence evidences that in the absence of express legal

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[599] Id. Annex II, ¶ 14.
[600] *Mellet*, Annex II, ¶ 11.
[601] Note that the position is different for states that have ratified Protocol 12 to the European Convention on Human Rights. Art. 1 of Protocol 12 introduced in 2005 an independent equality and non-discrimination right. In its jurisprudence, the Court has articulated that Article 14 can also function as an "autonomous" provision, i.e., it can be violated even where the substantive article relied upon to invoke Article 14 has not been violated. See, Belgian Linguistic case (1968) 1 EHRR 252, 283.
[602] *See, e.g., ABC v Ireland*, ¶ 270; *P&S v Poland*, ¶171.
[603] The Center for Reproductive Rights summarizes the original claim lodged at the Court on their website: http://reproductiverights.org/en/case/rr-vpoland-european-court-of-human-rights (accessed Nov 20, 2019).
[604] *ABC*, ¶¶ 126, 212–215, 268, 270.
[605] *ABC*, ¶270. Note, the Court cited its previous cases of Open Door, at ¶ 83; and *Tysiac v. Poland supra* note 468 at ¶144 in support of its decision not to examine the equality-based claims.
[606] *Tysiac*, *supra* note 468 at ¶139.

guarantees on abortion rights, international and regional human rights bodies have provided interpretive and textual support to protect a woman's right to abortion in certain circumstances. At present, the law on abortion presents an "exception-based framework" whereby states are required to legalize abortion in cases where the pregnancy threatens the life or health of the woman, is the result of rape or incest, or where there is severe fetal impairment.[607] Human rights bodies have mostly conceptualized abortion restrictions as violations of the right to health (CEDAW, CESCR), the right to be free from cruel, inhuman, and degrading treatment (HRC, European Court of Human Rights), and the right to privacy (European Court of Human Rights, HRC). Recognition of equality claims for abortion rights is evolving (HRC, CEDAW). Legal decisions have held states accountable for violations of human rights in situations where women are denied access to abortion (i) where states fail to provide affirmative protection for access to abortion that is legal in national law, and (ii) in the recent HRC decisions in *Mellet* and *Whelan*, the Committee went further and held that the state's failure to legalize abortion for non-viable pregnancies was a violation of the Convention.

B. Human Rights in Action

Returning to Ireland's story of abortion law reform, the next section explores whether the international human rights law standards just discussed contributed to the recognition of abortion rights in Ireland. And if so, how, and to what extent?

Legally, international human rights treaties are binding on States that have ratified such treaties, and the obligations set out on the treaties "must be performed in good faith."[608] As noted, the content and substance of international treaty obligations are set out in detail by their respective Treaty Monitoring Bodies and, in the case of the European Convention on Human

[607] UN Treaty Monitoring Bodies have also urged states to decriminalize abortion and to eliminate punitive measures for women and girls who undergo abortion and for those who provide or assist with abortions. This is not unilateral. The UNCRPD diverges from the other UNTMBs and calls for access to abortion in cases of a fatal fetal anomaly rather than severe impairment. *See*, Committee on the Rights of Persons with Disabilities Concluding observations of the Committee on the Rights of Persons with Disabilities Spain, CRPD/C/ESP/CO/1, (19-23 September 2011): Committee on the Rights of Persons with Disabilities Concluding observations of the Committee on the Rights of Persons with Disabilities Austria, CRPD/C/AUT/CO/1 (Sept 13, 2013).

[607] CEDAW Comm., General Recommendation No. 24, Article 12 of the Convention (Women and Health), U.N. Doc. A/54/38/Rev.1, (Feb 5, 1999) at ¶¶ 14, 31(c).

[608] Art. 26 VCLT.

Rights, the European Court of Human Rights. Decisions of the European Court of Human Rights are binding on states,[609] whereas the views of Treaty Monitoring Bodies are not. However, Treaty Monitoring Body decisions provide authoritative interpretations of the binding treaty obligations.[610] Notably, there exists no coercive sovereign to enforce international human rights law treaties. As a consequence, inquiries into the relative power of international legal rules and how international rules exercise power are perennial.

Traditional studies on the relative impact of international human rights law on domestic law and practice focus much of their analysis on the interactions between States and the "formal" architecture of international human rights law, namely the extensive network of widely adopted treaties and the accompanying institutional infrastructure that monitor state compliance with such treaties.[611] Under this view, the impact of international human rights law on domestic law and policy depends upon a top-down process whereby States respond to interstate or institutional coercion,[612] persuasion,[613] or socialization.[614] For others, the standards and institutions of international human rights law contribute to reform only when civil society actors — often via social movements — leverage human rights law to achieve their goals. These scholars go beyond the formal interactions between States and supranational structures to examine how civil society actors use international human rights advocacy to pressure governments to improve their practices.[615] Keck and Sikkink, for example, identify how local

[609] Art. 46 European Convention on Human Rights.
[610] Art. 38(1)(d) of the Statute of the International Court of Justice asserts that the views of Committee experts are a subsidiary source of international law. Charter of the United Nations and Statute of the International Court of Justice, *entry into force* Oct 24, 1945, 1 U.N.T.S. XVI.
[611] *See* LOUIS HENKIN, THE UNIVERSALITY OF THE CONCEPT OF HUMAN RIGHTS 25 (1989); *See infra* note 601.
[612] *See* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 11 YALE L.J. 1935 (2002) (arguing that the process of implementation actually fails most of the time); Daniel Hill, *Estimating the Effects of Human Rights Treaties on State Behavior*, 72 J. POL. 1161 (2010) 1162; On the European Court of Human Rights, consider Mark W. Janis, The Efficacy of Strasbourg Law, 15 CONN J INTL L 39, 39 (2000)
[613] *See*, ARYEH NEIER, THE INTERNATIONAL HUMAN RIGHTS MOVEMENT: A HISTORY (2012) (arguing that states respond to "naming and shaming" by other states or multilateral institutions); *see also* Ken Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM. RTS. Q. 63, 63 (2004); THOMAS RISSE ET AL. THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (1999) (arguing that foreign naming and shaming will be most effective in authoritarian states, precisely because in such an information-scarce environment, foreign condemnation will have a comparatively large impact in letting citizens and activists know that their rights are being violated).
[614] See, Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 630 (2004) (suggesting that human rights processes impact States as forms of persuasion or "acculturation" rather than coercion); *see also*, Harold Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUSE. L. REV. 623, 642 (1998) (arguing that states comply not because they are coerced but because the "transnational legal processes" of human rights law leads to the "internalization" of human rights norms).
[615] *See* Kiyoteru Tsutsui, *International Human Rights Law, and Social Movements: States' Resistance and Civil Society's Insistence* 8 (1) ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 367(2012); NEIL STAMMERS, HUMAN RIGHTS AND SOCIAL MOVEMENTS (2009) 2; Neil Stammers, *Social movements and the social construction of human rights*, 21 HUM. RTS. Q. 980 (1999). BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE (2003); D. C. THOMAS, THE HELSINKI EFFECT: INTERNATIONAL NORMS, HUMAN RIGHTS, AND THE DEMISE OF COMMUNISM (2001).

advocates (meaning advocates native to the impugned state) circumvent unmoving governments by transferring the debate to the international level, including by using international compliance mechanisms such as courts and treaty monitoring bodies.[616] The authors also detail how local actors generate international or 'external' pressure on violating governments by connecting with established international human rights advocacy groups and like-minded States to amplify their cause on the global stage.[617] As a result, civil society has overcome the weak enforcement capacity of most international human rights treaties. Notably, social movement scholars who study how legal mobilization (including international human rights law-based mobilization) is used by social movement actors similarly emphasize the agency and power of activists in driving social change.[618]

Among international relations scholars who argue that civil society movements do the work of moving States to comply with international human rights standards, some contend that success depends on the extent to which such actors make human rights change a matter of domestic politics.[619] Rather than bowing to international pressure, this line of scholarship asserts that State compliance with international human rights law depends upon whether, and to what extent, human rights movements generate *internal* pressure for change. Highlighting how international norms bodies support their claims, advocates target a number of in-country audiences; the legislature, the judiciary, and/or the public. In domestic litigation, legal interest groups may prompt judges to invoke international human rights obligations for both normative insight and legal force.[620] Moreover, litigation is newsworthy, and media reports of a citizen contesting State abuse abroad can both raise the profile for a cause and capture the attention of politicians and citizens. [621]

In their discussion of the human rights frame in connection to transnational feminism, Charlotte Bunch and Samantha Frost have argued that the "large body of international covenants, agreements, and commitments about human rights gives women political leverage and a

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[616] MARGARET KECK AND KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998) [hereinafter KECK AND SIKKINK]; *see also*, BOB CLIFFORD, THE INTERNATIONAL STRUGGLE FOR NEW HUMAN RIGHTS (2008) (describing how local activists can connect with a broader global human rights movement of international NGOs, international organizations, state bureaucracies, foundations, journalists, individuals who devote significant resources to the cause and in some cases develop international legal codes to cover such as for wartime rape and HIV).

[617] *Id. See also*, Xinyuan Dai, *The "Compliance Gap" and the Efficacy of International Human Rights Institutions*, in THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE, 85.

[618] Michael W. McCann, *Social Movements and the Mobilization of Law*, in SOCIAL MOVEMENTS AND AMERICAN POLITICAL INSTITUTIONS: PEOPLE, PASSIONS, AND POWER 201, 209 (Anne N. Costain & Andrew S. McFarland eds., 1998).

[619] BETH SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009) 126 [hereinafter SIMMONS, MOBILIZING FOR HUMAN RIGHTS].

[620] For example, see Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZA L. REV. 253, 282 (1999).

[621] MICHAEL W. MCCANN, RIGHTS AT WORK 144, 145 (1994).

tenable point of reference."[622] Similarly, advocates can place previously unacknowledged abuses in the context of human rights to legitimize their claims and also to educate national constituencies at both governmental and local levels.[623] In other instances, using human rights language to describe a grievance can depoliticize issues and generate space for dialogue on contentious or taboo topics. Activist claims may also become more evident, and in turn more salient, in the public consciousness when demands for change are centered upon specific rights.[624] As such, international human rights advocacy not only shames the state abroad but can be leveraged to change opinion at home.

Another body of the literature contends that the real influence of international human rights on social change can be measured by studying the impact of human rights advocacy on movement actors.[625] Scholars note that the language of human rights can serve as a focal point to engage a broader range of allies in a movement[626] or individuals who oppose governing powers for other reasons may offer support to a human rights-based movement in the hopes of undercutting State power. A movement's base may expand as rights-based framing enables individuals and groups to see themselves as bearers of rights in a way that they did not before.[627] Others have studied how international human rights advocacy facilitates networking opportunities—via international forums in which activists and social movement organizations interact with each other—that have myriad advantages for a movement.[628] Human rights activists may share ideas or technical expertise[629] and forge coalitions to advance a cause on the global stage to increase pressure on perpetrators to offer redress.[630] Global networks can also help social movements gain funding.

Overall, the literature on the significance and efficacy of human rights discourse, norms, and strategies includes myriad theories, many of which contest the relevance and legitimacy of the international system and its

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[622] Charlotte Bunch and Samantha Frost, *Human Rights*, in ROUTLEDGE INTERNATIONAL ENCYCLOPEDIA OF WOMEN: GLOBAL WOMEN'S ISSUES AND KNOWLEDGE, VOL. 2 (Cheris Kramarae and Dale Spender, eds. 2000) 1078.

[623] *See, e.g.,* Alicia Yamin and Paolo Bergallo, *Narratives of Essentialism and Exceptionalism: The Challenges and Possibilities of Using Human Rights to Improve Access to Safe Abortion* 19(1) HEALTH AND HUMAN RIGHTS JOURNAL (2017).

[624] SALLY ENGLE Merry, *Human rights and transnational culture: regulating gender violence through global law*, 44 OSGOODE L.J. 53, 58.

[625] *See* Kiyoteru Tsutsui, *Human Rights and Minority Activism in Japan: Transformation of Movement Actorhood and Local-Global Feedback Loop* (4) 122 AM. J. SOCIOLOGY 1050 (2017); NITZA *BERKOVITCH*, FROM MOTHERHOOD TO CITIZENSHIP: WOMEN'S RIGHTS AND INTERNATIONAL ORGANIZATIONS (1999).

[626] BETH SIMMONS, *supra* note 614 at 145.

[627] S*ee* Robert D. Benford & David A. Snow, *Framing processes and social movements: an overview and assessment* 26 ANNU. REV. SOCIOLOGY 611 (2000); SIDNEY TARROW THE NEW TRANSNATIONAL ACTIVISM.

[628] See Keisuke Iida, *Human rights and sexual abuse: the impact of international human rights law on Japan* 26(2) HUM. RIGHTS Q. 428 (2004).

[629] See SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE.

[630] Keck & Sikkinck, *supra* note 312 at 169.

instruments.[631] Rachel Rebouche suggests that human rights rhetoric may inhibit struggles to redistribute power and resources for reproductive rights at both the global and local levels.[632] Susan Marks refers to human rights as "'blinders that narrow our field of vision and prevent us from seeing (and hence from challenging) the wider scene."[633] Studies also present accounts of how that human rights discourse can serve both limiting and expansive ends and, depending on the context, constrain and enable transnational solidarity.[634] Some critical legal scholars contend that rights-based claims constrain movements since they require validation by the state, and in turn, should be recognized as 'depoliticized constructs.'[635] And from a post-colonial perspective, human rights claims are often deemed 'western,' elitist, imperialist.[636]

By exploring how international human rights law and advocacy impacted Irish abortion law reform, the following account provides empirical evidence to support much of the scholarship just outlined. On its face, the course of abortion rights reform in Ireland was a multi-faceted process that required legal, political, and social change. Formally, it required political will to initiate a referendum to repeal the 8th amendment and majority societal support to vote in favor of repeal to enable the Oireachtas to legislate for abortion access. Ultimately, it was the civil society movement for abortion rights that triggered both events to deliver reform. At different junctures in their struggle, international human rights advocacy was one of their most useful resources in pressuring the state to initiate reform, in strengthening the composition and reach of the movement, and in legitimizing the claim for abortion rights enhance its legitimacy. At other points, however, human rights-based advocacy presented potential drawbacks for the movement. When the movement's call for a referendum to repeal the 8th became a reality, the formal legal standards on abortion rights in international law no longer aligned with the movement's goals for liberalization. Recognizing a woman's right to abortion in the limited situations where a pregnancy is a result of rape or is not viable, or where abortion is necessary to protect a woman's life and

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[631] *See generally*, Frédéric Mégret, *Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes,* 3, NEW APPROACHES TO INTERNATIONAL LAW (J M Beneyto and D Kennedy eds., 2012).
[632] Rachel Rebouche, *Reproducing Rights: The Intersection of Reproductive Justice and Human Rights*, 7 U.C. IRVINE L. REV. 579 (2017).
[633] Susan Marks, *Human Rights, and Root Causes*, 74 MOD. L. REV. 57, 59 (2011).
[634] David Landy, *Talking Human Rights: How Social Movement Activists Are Constructed and Constrained by Human Rights Discourse*, 28 (4) INTERNATIONAL SOCIOLOGY (2013) (describing how Jewish activists appeal to the "universalist nature of human rights language" to justify their criticism of Israel and to counter critiques from Zionists, while Palestinian activists use human rights discourse to decry torture of Palestinian prisoners and counter Islamic fundamentalism or other claims with which they disagree).
[635] *See, e.g.,* Mary Bernstein, Anna-Maria Marshall, and Scott Barclay, *The Challenge of Law: Sexual Orientation, Gender Identity, and Social Movements*, 1 in QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW (Scott Barclay eds., 2009).
[636] *See, e.g.*, Inderpal Grewal, '*Women's Rights as Human Rights': Feminist Practices, Global Feminism, and Human Rights Regimes in Transnationality*, 3(3) CITIZENSHIP STUDIES 337 (1999).

health, reform based on international human rights law would have fallen far short of the movement's calls for 'free, safe and legal abortion access. As such, this study contributes to debates about both the opportunities and tensions generated by international human rights advocacy.

1. *A formative role*

A human rights-based movement to liberalize Irish abortion law emerged only in the latter half of the 8th amendment's existence. As described in Chapter 1, it was the anti-abortion campaign that assertively mobilized both to pass the abortion amendment and subsequently turned to the courts to copper-fasten Ireland's status as a "pro-life nation."[637] Their activism successfully centered on human rights for the fetus. When the amendment was debated in the legislature, the majority view was that "the amendment is all about the most fundamental right, the right to life"[638] – that of the "unborn," not a pregnant woman. In fact, for PLAC, the recognition of positive rights for the unborn child—not just prohibiting abortion—was fundamental; when the Attorney General recommended that the amendment read "[n]othing in this Constitution shall be invoked to invalidate or to deprive of force or affect, any provision of law on the grounds that it prohibits abortion" the PLAC rejected it because it did not explicitly recognize the right to life of the child.[639]

For the anti-amendment activists who resisted the tactics of the PLAC campaign, it was challenging to make a case against the 8th amendment in terms of women's rights.[640] Such was the impossibility of making feminist arguments that the Anti-Amendment Campaign (AAC) made a strategic decision to mute forceful calls for women's rights and instead argued against the amendment on the grounds that it was a "sectarian law" that would deny non-Catholics equal rights to citizenship in Ireland (in particular those in the six counties of Northern Ireland). The AAC reasoned that the country should "support pluralism" and thereby reject the constitutional amendment.[641] The AAC went as far as to contend that the "radicals" who refused to lessen their demands for women's abortion rights were "playing into the hands of the Pro-Life Amendment campaign."[642]

Asset out in Chapter 1, ultimately, the Pro-Life Amendment Campaign prevailed in the referendum such that Irish law required the state to respect

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[637] The author borrowed this term from sociologist Lisa Smyth. *See* LISA SMYTH, ABORTION AND NATION: THE POLITICS OF REPRODUCTION IN CONTEMPORARY IRELAND (2009).
[638] Rory O'Hanlon, TD (Feb 17, 1983) https://www.oireachtas.ie/en/debates/debate/dail/1983-02-17/3/.
[639] *See, e.g.,* Gerard Hogan, *Law and Religion: Church-State Relations in Ireland from Independence to the Present Day* 35(1) AM. J. OF COM. L. 37, 78 (1987).
[640] *See, e.g.,* Sandra McEvoy, *From Anti-Amendment Campaigns to Demanding Reproductive Justice supra* note xx.
[641] CHRYSTAL HUG, THE POLITICS OF SEXUAL MORALITY IN IRELAND, 149.
[642] Alan MacSimoin, *How free can you be if you can't even control your own body? Red and Black Revolution*, Mar 14, 2008, 15 at, http://www.wsm.ie/c/red-and-black-revolution-14.

"the right to life of the unborn, with due regard to the equal right to life of the mother" and to defend and vindicate the unborn's life "as far as practicable." And though victorious, anti-choice groups continued their battle.

Following the passage of the amendment (1983), the anti-abortion groups turned their attention to the family-planning clinics that were advising Irish women about the availability of lawful abortions in England. The Society for the Protection of the Unborn Child (SPUC) successfully obtained an injunction against the clinics by arguing that their activities violated the 8th amendment's right to life of the unborn.[643] The clinics were forced to close.[644] In response, Irish pro-choice groups turned to international human rights mechanisms for the first time.

In 1988, the clinics launched a complaint with the European Court of Human Rights. In *Open Door and Dublin Well Woman v. Ireland*, they argued that by preventing the clinics from disclosing abortion-related information to women, Irish courts were in breach of the European Convention on Human Rights, in particular the Convention's protections for freedom of expression (Article 10).[645] The clinics also asserted that the injunction discriminated on the basis of political opinion on the grounds that persons who sought to counsel *against* abortion were permitted to express their views without restriction.[646] Additionally, the clinics argued that women have a right to abortion under Article 8 of the Convention, which guarantees the "right to respect for . . . private and family life."[647]

For the Court, there was no dispute about whether the injunction interfered with the clinics' rights to impart and receive information under Article 10(1); the injunction expressly prohibited their speech.[648] Though the state argued that because Article 2 of the European Convention protected the right to life, it was justified in prohibiting information that would threaten the right to life of the "unborn,"[649] the Court declined to address this. Additionally, the Court did not address the applicants' claim that the right to private life conferred a right to abortion or that restricting abortion information was a form of political discrimination. Judicial deliberations focused on whether the restrictions on the clinics' speech could be justified under Article 10(2) of the European Convention on Human Rights, which permits restraints on speech where they are "prescribed by law" and

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[643] S.P.U.C. (Ireland) Ltd. v. Open Door Counselling, 1988 I.R. 618, 621 (Ir. S.C.).

[644] Pro-choice activists continued to provide information on abortion to women. The founder of Open Door Counselling, Ruth Riddick, used her own phone number to continue non-directive counselling from her home. *See* Linda Connolly, THE IRISH WOMEN'S MOVEMENT, 70.

[645] *Open Door and Dublin Well Woman v. Ireland*, 246 Eur. Ct. H.R. (ser. A) (1992) [hereinafter *Open Door*].

[646] *Id.* 81, 82.

[647] *Id.* 32.

[648] *Id.*

[649] *Open Door*, ¶ 28. *See generally*, David Cole, *Going to England: Irish Abortion Law and the European Community*, 17 HASTINGS INT'L & COMP. L. REV. 113 (1993).

"necessary in a democratic society" to further one of a series of specified interests. The specified interests permitted under the Convention include national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[650] The Court accepted that Ireland had a "legitimate aim" in adopting the injunction, namely, the protection of morals. However, the injunction failed the Court's proportionality test; the Court reasoned that because Ireland allowed thousands of women to travel abroad to obtain abortions, and had not disputed that resourceful women could get this information in other ways, preventing the clinics from disseminating abortion information seemed to be doing little work in actually stopping women from having abortions, meaning that the injunction had little impact on the 'protection of morals.'[651] For such reasons, the Court held that the injunction was not narrowly tailored to its purpose. Additionally, the Court asserted that the injunction disproportionately harmed women who did not have the resources to find out how to get the information and only served to prolong the amount of time that women would have to wait before having an abortion—which could be detrimental to their health.[652]

For pro-choice activists in Ireland, their first foray into the institutions of international human rights was successful; neglecting any question that related directly to abortion or the status of the "unborn," the European Court of Human Rights invalidated the injunction against the clinics in its entirety.

In contrast to the clinics, the student groups who were banned from distributing information on abortion services abroad did not appeal to the European Court of Human Rights. Their barrister, Mary Robinson (who went on to become the first woman President of Ireland and later UN High Commissioner for Human Rights), had defended the students in the Irish High Court, arguing that their information sharing activities were protected by European Community law resulting in the Irish High Court itself referring these questions to the European Court of Justice (ECJ).[653] In 1991, the ECJ in *Grogan* agreed with the defendant students that abortion was a "service"

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[650] Article 10(2) of the Convention provides: The exercise of these freedoms since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary for a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov 4, 1950, 213 U.N.T.S. 221 (1955).

[651] *Open Door*, 18.

[652] *Open Door*, 24.

[653] Grogan, 1989 I.R. 753 (Ir. H. Ct.). Under Article 177 of the Treaty of Rome, a domestic court may refer questions concerning EC law to the ECJ where it "considers that a decision on the question is necessary to enable it to give judgment." EEC Treaty Art. 177.

within the Treaty of Rome and that the Irish citizens had the right to receive and impart information about medical services that were lawful in another Member State of the European Economic Community.[654] However, the ECJ held that the student groups did not have standing to raise the claim because they lacked an economic relationship with the English providers of abortion services.[655] In consequence, the ECJ then did not need to decide whether the High Court's injunction prohibiting the distribution of abortion services in other EU States violated the treaty. In this way, the ECJ avoided a showdown with the Irish Courts, nor did they need to address any questions of human rights.

Though *Open Door* and *Grogan* frustrated the goals and unchecked success of the pro-life lobby in Ireland, the two decisions were limited in scope and did nothing to liberalize abortion access in Ireland. Nevertheless, some anti-abortion campaigners responded to the European cases with claims that Ireland was on its way to allowing "abortion on demand."[656] The *X-case* in 1992[657]—where the Supreme Court concluded that abortion was lawful in Ireland where there was a real and substantial risk to the life of women, including risk from suicide—elevated these fears dramatically. Responding to the case, William Binchy, legal advisor to PLAC, alleged that Ireland now had the "most liberal abortion law in the world."[658] In reality, abortion remained a criminal offense; in theory, abortion was available if a pregnant woman was suicidal, but in practice, no abortions were carried out on that basis. Information was still restricted. The Regulation of Information Act (1995)—the legislation intended to give effect to the right to information following the *Open Door* decision and the 1992 referendum—criminalized "advocacy or promotion" of abortion. "Advocacy or promotion" was not defined. Devoid of guidance on what advice was permissible, healthcare providers rarely spoke about abortion to women for fear of prosecution. Doctors were also explicitly prohibited from providing referrals.[659] The first comprehensive study of women and crisis pregnancy in Ireland found that in practice, women and girls found it very difficult to obtain information on both contraception and abortion.[660]

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[654] Grogan, 1991 E.C.R. I-4685, ¶ 21. *See also*, Siofra O'Leary, *Freedom of Establishment and Freedom to Provide Services: The Court of Justice as a Reluctant Constitutional Adjudicator: An Examination of the Abortion Information Case*, 16 EUR. L. REV. 138, 156 (1992).

[655] *Id.*

[656] *See, e.g.*, Michael O' Regan, *Leading Judge Condemns Abortion Information Act*, IRISH TIMES, Jul 10, 1995, at 4 (quoting Mr. Justice Brian Walsh, a member of the European Court of Human Rights and a former Irish Supreme Court justice).

[657] *Attorney Gen. v. X*, *supra* note 155.

[658] Andy Pollak, Hierarchy Criticizes Supreme Court, IRISH TIMES, Jul 1, 1995, at 8.

[659] Regulation of Information Act (1995), 1995 Act, § 8 (1) reads; "It shall not be lawful for a person to whom Section 5 applies or the employer or principal of the person to make an appointment or any other arrangement for or on behalf of a woman with a person who provides services outside the state for the termination of pregnancies. Sections 9 and 10 set out the legal enforcement of the offense."

[660] Evelyn Mahon et al., *Women and Crisis Pregnancy: A Report Presented to the Department of Health and Children* (1998).

Nor was anti-abortion hegemony significantly undermined in the decade that followed *X, Open Door*, and the 1992 constitutional amendments. During this period, pro-choice activists concentrated their efforts (unsuccessfully) on lobbying successive governments to give effect to the *X*-case through legislation, i.e., to make clear through a statute that women could legally obtain an abortion if their life was at risk. In 1997, a group of women formed the umbrella group, the 'Alliance for Choice,' and condemned political inaction on *X* through demonstrations, leaflets, and direct lobbying. The pro-choice ask was relatively modest; the Government had been chastised by the country's own Supreme Court for not providing legislative guidance on life-saving abortion access.[661] And the State's Constitutional Review Group—a group established by the Irish government in 1995 to review the Constitution of Ireland and to recommend alterations—also recommended that the Government introduce legislation to implement the *X*-case.[662] As described earlier in this chapter, at this time internationally, feminist human rights groups were succeeding in gaining recognition for reproductive health rights: the 1995 Beijing Declaration and Platform for Action, agreed by 187 UN member states, listed the right of a woman to control her own sexuality and reproduction as a human right. Closer to home, most of Europe operated liberal abortion laws (with the exception of Malta, San Marino, and Poland) such that Ireland was firmly out of step. However, in Ireland, not even the most conservative calls for action on women's rights could move the Government, or any sizeable political party, to touch abortion rights. Unless that is if it was to constrain such rights. In March 2002, at the urging of anti-abortion groups and four independent TDs, the Taoiseach introduced yet another constitutional referendum designed to roll back the very limited legal right to abortion. The proposed amendment — like its predecessor 10 years before — aimed to overturn the *X*-case ruling by removing the risk of suicide as grounds for abortion.[663] With just a 40 percent turnout, 618,485 people voted in favor of the Government's motion, and 629,041 voted against it.[664] The anti-abortion lobby had lost once again.

In the aftermath of the 2002 referendum, the Irish Family Planning Association (IFPA), a Dublin-based reproductive health clinic that provided services including counseling, contraception, and post-abortion care, decided that pro-choice advocacy in Ireland needed a new strategy. Recognizing that since the first constitutional referendum on abortion in 1983, the Irish public had consistently voted against further restrictions on abortion access, it seemed clear to the IFPA that the main barrier to change was not the cited religious or even anti-choice views of the Irish people; rather it was political

[661] *See* Chapter 1.
[662] Constitution Review Group, Report of the Constitution Review Group (1996).
[663] S*ee* Chapter 1.
[664] Twenty-Fifth Amendment of the Constitution Bill 2001 (Bill no. 48 of 2001).

recalcitrance.[665] Similarly, the consistently high numbers of women traveling for abortion indicated that the personal beliefs of thousands of Irish women were not 'anti-abortion.' Rather than wait another attack by anti-abortion advocates or sit through another decade of political indolence, the IFPA resolved to proactively campaign for women's abortion rights. International human rights offered key resources to match the movement's shift in approach, namely the *first* proactive legal challenge to the 8th amendment.

Legal mobilization via strategic legislation for abortion law reform was first suggested by a consultant lawyer at the organization, Ms. Julie Kay, who had worked as a litigator for a pro-choice advocacy organization, the Center for Reproductive Rights, in New York.[666] The Irish judicial system's conservative interpretation of the 8th amendment—such that the Courts had judged the amendment to permit abortion only where there is a "real and substantial risk to the life" of the pregnant woman that can only be averted by termination of the pregnancy[667]—meant that chances of success were poor if the IFPA litigated for reform domestically. International human rights institutions presented the only viable venue for legal challenge.

Embracing international human rights as a strategy was a matter of pragmatism in one sense—it provided the only forum where court-based activism to pressure the State into changing its restrictive laws could plausibly succeed. However, as noted already in this chapter, research indicates that litigation can yield many indirect effects for a social movement. While the IFPA aimed to use international litigation to force the hand of the State, they also viewed this advocacy as an opportunity to educate people about the harms of the 8th amendment and move people to recognize the injustice that women endured.[668] Beyond this, they envisioned the case, and their media and advocacy around it, as an opportunity to mobilize people to join their campaign for abortion rights.[669] Additionally, for the IFPA, using international human rights-based advocacy seemed like a natural progression in some ways. In the late 1960s, the organization was founded on human rights principles by doctors and nurses who were concerned by the health impacts of the denial of contraception and abortion in Ireland on the lives of women (particularly women with repeated unwanted pregnancies). Such impacts were heightened for women with few financial resources, and the founders felt that using a human rights framework helped address these

[665] Interview with Niall Behan, Irish Family Planning Association, June 2018. Notes on file with author.
[666] Interview with Ms. Julie Kay, Former Lawyer for the Irish Family Planning Association, New York, Sept 9. 2018. Headquartered in New York but with regional offices in Geneva, Bogota, Nairobi, and Kathmandu, the Center for Reproductive Rights is the leading advocate for sexual and reproductive rights in the international arena, as well as a well-known domestic organization.
[667] *Attorney Gen. v. X.,* supra note xx.
[668] *See*, *e.g.*, press release, https://www.ifpa.ie/ifpa-launches-campaign-for-safe-and-legal-abortion-in-ireland/.
[669] *Id.*

challenges.[670] Furthermore, the IFPA was an affiliate of the International Planned Parenthood Federation (IPPF), whose IPPF Charter draws on international sexual and reproductive rights.

Amongst the venues for international litigation, the European Court of Human Rights was the most attractive for the IFPA because its decisions are binding on the Irish state.[671] The Court provides for individual petitioning and a general obligation to provide recourse to a remedy. It also has a mechanism to allow the Council of Europe's (COE) Committee of Ministers to bring infringement proceedings against States that refuse to implement the Court's judgments.[672]

The first international legal challenge that the IFPA worked on did not work out as the advocates hoped. First, the applicant did not retain the IFPA as her supporting organization because the IFPA hoped to make a joint application on behalf of a number of women, while the applicant, D, did not want to join this approach.[673] Second, her case, *D v. Ireland*, was deemed inadmissible by the European Court.[674] *D* involved a woman pregnant with twins, one of which stopped developing at eight weeks gestation. The other twin was diagnosed with Edwards's Syndrome, a severe abnormality that would lead to the death of the baby shortly after delivery.[675] Her doctors informed her that there was nothing they could do for her—abortion was illegal, and referring her to a clinic abroad was also illegal. She was left to "go home and sort it out" herself.[676] She did so and terminated her pregnancy in Belfast, Northern Ireland, where abortion was legal in cases of fetal anomaly.

D's application to the European Court complained that the 8th amendment and Ireland's Regulation of Information (Services Outside the State for Terminations of Pregnancies) Act 1995 prevented her from terminating her pregnancy in the jurisdiction where she lived and restricted her medical team from referring her to services outside the State, in violation of her rights to (i) be free from cruel and inhuman treatment (Article 3), (ii) to private life (Article 8), (iii) to receive and impart information (Article 10) and

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[670] Interviews with Maeve Taylor, Chief Advocacy Officer, Irish Family Planning Association, Dublin, Jan 4, 2016, Jun 25, 2016 and Jun 13, 2018 (notes on file with author).

[671] For more see, SUZANNE EGAN ET AL. IRELAND AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: 60 YEARS AND BEYOND (2014) 12-19.

[672] *See, e.g.,* Committee of Ministers of the COE, *Izmir Declaration* (2011) https://www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf.

[673] Interview with Ms. Julie Kay, *supra* note 662.

[674] *D v Ireland, supra* note 412.

[675] Jennifer Schweppe and Eimear Spain, *When is a Fetus not an Unborn? Fatal Fetal Abnormalities and Article 40.3.*30 [2013, 3 (3)] I.J.L.S. 92-110, 97.

[676] Nine years after the European Court of Human Rights decision, D spoke publicly about her experience on the Irish news. She emphasized her shock when told that she couldn't have an abortion: "I assumed there would be a system in our hospitals where there would be a sympathetic arrangement. Finally, I found on our own island (Northern Ireland) there was a place where compassion and sympathy, and tolerance prevailed. If there can be that sort of tolerance on our island just across the border, I don't see why we don't have that here." Deirdre Conroy, *RTÉ News at One*, May 2, 2013.

(iv) to be free from discrimination in the enjoyment of Convention rights (Article 14) of the European Convention on Human Rights.[677] In response, Ireland argued that it was "an open question," given the circumstances of *D*, as to whether the 8th amendment could allow for a lawful termination,[678] claiming that "there *might* be an issue as to the extent the State was *required* to guarantee the *right to life* of a fetus that would not survive beyond birth."[679] (Yet in 2013, when the ministers for health and justice were defending the limitations of the new PLDPA, they argued that they were prevented by the Constitution from allowing for abortion in cases of fatal fetal abnormality, and as a result, no provision was made.) The European Court decided there was a "feasible argument to be made" that the 8th amendment's balance between the right to life of the mother and the fetus could have shifted in favor of the mother as the fetus was not viable.[680] D should have taken her case to the Irish Courts to find out, the Court concluded. Accordingly, in June 2006, the Court deemed her case inadmissible because she had not exhausted available domestic remedies.[681]

The IFPA lodged their challenge to Ireland's ban on abortion in 2005 as part of their 'Safe and Legal in Ireland Abortion Rights Campaign,'—the first pro-choice campaign in the country outside of a referendum.[682] Four years later, the Grand Chamber of the European Court heard the case *A, B, C v. Ireland* in Strasbourg. Asset out in Part I, the applicants made a cluster of claims under Article 8 of the European Convention, arguing that Ireland's abortion law violated the right to private life by interfering with their physical integrity, limiting relevant information on abortion and instigating stigma, delay, hardship, and stress in forcing women to travel secretly to England for an abortion.[683] Under Article 3, they argued that the two options open to women—make their way to another country to get an abortion or maintain their unwanted pregnancies—were degrading and a deliberate affront to their dignity.[684] These claims were argued in conjunction with Article 14, the right to be free from discrimination, on two grounds.[685] First, they argued that the criminalization of abortion was discriminatory, as it amounted to "crude stereotyping and prejudice against women" and caused an affront to women's dignity.[686] Second, they emphasized that the requirement to travel imposed

[677] *D v. Ireland, supra* note x.
[678] *Id.* ¶ 98.
[679] *Id.* ¶ 69.
[680] *Id.* ¶ 90-92.
[681] *Id.* ¶ 103.
[682] IFPA Launches Campaign for Safe and Legal Abortion in Ireland (Aug 8 2015) https://www.ifpa.ie/ifpa-launches-campaign-for-safe-and-legal-abortion-in-ireland/ .
[683] *A, B, and C v Ireland*, *supra* note 12, ¶ 269.
[684] *Id.* ¶ 162.
[685] Interview with Ms. Julie Kay, *supra* note 662; Interview with Maeve Taylor, *supra* note 666.
[686] *A, B, and C v. Ireland*, *supra* note 12, ¶ 162.

severe burdens on women with limited financial resources.[687] As Irish abortion advocates reiterate, although women from all walks of life have abortions, it is predominantly women who are poor, young, disabled, living in rural areas, or have migrant status who disproportionately bear the burden of travelling abroad.

Given that Ms. A and Ms. B had aborted their pregnancies for reasons relating to their wellbeing and socio-economic status, their abortions were clearly outside the life-saving exception to Ireland's abortion ban. As such, the *ABC* litigation fundamentally challenged the Irish abortion regime—a marked contrast to the incremental approach of *D v. Ireland,* which had contested only the law's failure to exempt from criminalization abortion in cases of fatal fetal anomaly. The plaintiffs' narratives in *ABC* also differed strikingly from *D*. *D* was a married woman who aborted a much-wanted pregnancy. Ms. A and Ms. B were both single, poor, and terminated unwanted pregnancies. Additionally, *A* was a recovering alcoholic, and *B* a non-national. Though plaintiff selection in impact litigation often prioritizes conservative narratives[688]—plaintiffs who look and sound like other members of respectable society—the IFPA carefully selected the three women to represent the diversity of women affected by the 8th amendment.[689] The IFPA considered that Ms. A, Ms. B, and Ms. C were women who made "rational and empowering decisions" after weighing their circumstances: women who have economic reasons for terminating pregnancies; women who have consensual sex but contraception fails; and women with complex family demands, *as well as* women who need abortions to preserve their lives and health or to tragically end a non-viable pregnancy.[690] The advocates did not wish to risk reinforcing narrow conceptions of the "reasonable" or "deserved" abortion by taking a case that centered on an exceptionally tragic case (such as pregnancy due to rape, incest, or fatal fetal anomaly). For the IFPA, taking this case was an opportunity to inclusively present narratives of the women they served in a respectful way, away from the vitriol that had silenced women for decades.[691]

The advocates considered that their Article 14 non-discrimination claims were among their strongest and that the European Court would decide *ABC* in their favor on the grounds of non-discrimination and equality. They believed that the Court would not find it difficult to recognize the *de jure*

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[687] *Id.* ¶ 163.

[688] *See, e.g.,* Scott Skinner-Thompson, *The First Queer Right*, 116 MICH. L. REV. 881 (2018) (describing how advocates engaged in strategic litigation for LGBTQ causes in the USA often choose plaintiffs who are "upstanding" as part of their bid for success).

[689] Interview with Ms. Julie Kay, *supra* note 662.

[690] *Id. See also*, Irish Family Planning Association, *Abortion Stigma*, https://www.ifpa.ie/abortion-stigma/ .

[691] *Id.* Social science research confirms that the choice of plaintiff in strategic litigation is important for telling the "story" of the case both in and outside of court. See, e.g., Jennifer Sheppard, *What If the Big Bad Wolf in All Those Fairy Tales Was Just Misunderstood?: Techniques for Maintaining Narrative Rationality While Altering Stock Stories That Are Harmful to Your Client's Case*, 34 HASTINGS COMM. & ENT. L.J. 187, 190–94 (2012).

discrimination in requiring women to go abroad for health services when men were not sent to other countries for any health service.[692] Similarly, the disproportionate impact of the law on women without financial security was, in the advocates' opinion, a blatant example of socio-economic discrimination.

In response, the Government lawyers argued that Ireland's abortion law represented the "profound moral choice of the Irish people as to the nature of unborn life."[693] Ireland's Attorney General at the time, Paul Gallagher, pleaded with the 17 judges to accept that Ireland's abortion law embodied moral values that were "deeply embedded" in the country's history and traditions.[694] This was the winning argument. Asset out in the prior section, though the Court found that there had been an interference with Ms. A's and Ms. B's right to private life, "owing to the acute sensitivity of the moral and ethical issues raised by abortion,"[695] Ireland was entitled to a wide degree of difference in how it dealt with abortion.[696] And once it had rejected A and B's Article 8 claim, the Court dismissed their Article 3 claim and simply did not discuss their claims of discrimination. The European Court upheld the 8th amendment.

In a narrow decision, the majority found in favor of Ms. C, holding that Ireland's failure to give legislative effect to the *X*-case exception to the abortion ban (i.e., where the woman's life was threatened by the pregnancy) violated Ireland's positive obligations under the right to private life.[697] Rather than deliver Europe's '*Roe v. Wade*,' the European Court served as "an ally with a small 'a'" for abortion rights in Ireland.[698]

Limited legal "win" aside, the strategic use of human rights litigation finally provided the abortion right movement with a foothold in its struggle against the Irish State. Up to this point, the Ireland in which the IFPA and other pro-choice activists had attempted to campaign in presented advocates with many of the same challenges that autocratic States impose on human rights struggles—rule of law was weak (given that successive governments rebuked the judiciary by failing to legislate for *X*);[699] political activism was stymied by the need to concentrate resources on services (in this case, supporting women who needed to travel); pro-choice groups had no influence on decision-makers, and victims of the law were too fearful to speak out about

[692] Interview with Ms. Julie Kay, *supra* note 662.
[693] *A, B, and C v Ireland*, *supra* note 12, ¶ 185.
[694] *Id.* ¶ 14.
[695] *Id.* ¶ 233.
[696] *Id.* ¶¶ 222, 232, 238, 242.
[697] *Id.*
[698] Interview with Deputy Clare Daly, Jun 8, 2016.
[699] Mitchell & Spellman, *Domestic Legal Traditions and States' Human Rights Practices* 50(1) JOURNAL OF PEACE RESEARCH, 189-202 (2013).

their experiences.[700] International human rights litigation did not directly produce the desired results. Nonetheless, the case enabled the movement to legally challenge the 8th amendment for the first time and to proactively campaign for abortion rights for Irish women.[701]

In the absence of political leadership and a viable legal forum domestically, going to the European Court of Human Rights provided an institutional environment for advocates to go on the offensive and to initiate a proactive campaign for abortion rights.[702]

2. *Formal legal role*

"*A decision from Strasbourg in your favor is the gold standard in terms of enforceability and seriousness*."[703]

Commentators and skeptics usually cite the weak enforcement mechanisms of international human rights law as a key reason for the system's limited impact on national law. Still, even skeptics recognize the impressive oversight mechanisms of the European Court of Human Rights.[704] Described as a "bright spot" in terms of international human rights compliance,[705] a decision from the Strasbourg Court "in your favor is the gold standard for advocates in terms of enforceability and seriousness."[706]

As described in Chapter 1, following *ABC*, the Irish Government committed to establishing an 'expert group' to advise the state on the implementation of the European Court's ruling.[707] It was against this backdrop that a newly elected independent, TD Clare Daly, prepared legislation to give effect to the *X*-case ruling (legislative recognition while making clear that she favored access to abortion in any circumstances that a woman sought it). Her bill in private member's time on April 18 and 19, 2012, was heavily defeated. Still, it was the first time that abortion was proactively

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[700] On the silence that characterized women's experiences under the law see generally, Ruth Fletcher, *Silences: Irish women and Abortion,* FEMINIST REVIEW 50 (1995); Maeve Taylor, *Abortion Stigma: a health service provider's perspective, in* THE ABORTION PAPERS IRELAND 217, (AIDEEN QUILITY EDS. 2016); KRISTEN M. SHELLENBERG, *Social Stigma, and Disclosure about Induced Abortion: Results from an Exploratory Study*, 6 (1) GLOBAL PUBLIC HEALTH (2011).

[701] Interviews with Maeve Taylor, *supra* note 666, and Niall Behan, Chair of the Irish Family Planning Association, Dublin, Jun 14, 2018.

[702] *Id.*

[703] *Id*.

[704] *See, e.g.*, George Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 40 TEX. INT'L L.J. 359, 367 (2005).
In terms of actual enforcement power, the Council of Europe's Committee of Ministers can bring infringement proceedings against states that refuse to implement the Court's judgments. Additionally, the Court's decision on one case extends to all similar pending cases. *See*, *e.g.*, *Committee of Ministers of the Council of Europe High-Level Conference on the Future of the European Court of Human Rights*, Izmir Declaration.

[705] Laurence Helfer, *Nonconsensual international lawmaking*, 2008 U. ILL. L. REV. 71, 87.

[706] Interview with Maeve Taylor, *supra* note 666.

[707] Department of Health, Report of the Expert Group on the Judgment in *A, B and C v. Ireland*, http://health.gov.ie/wpcontent/uploads/2014/03/Judgment_ABC.pdf.
Published November 2012.

discussed in the Dáil without a tragedy provoking it, instead from "the standpoint that abortion was an important human rights issue."[708] Later that year, Savita Halappanavar died after being refused an abortion, in a situation where her inevitable miscarriage carried the risk of fatal sepsis on the grounds that her medical team could detect a fetal heartbeat.[709] The report of the expert group was published only two weeks after news of her death, and the circumstances of her death broke. The expert group's report was explicit that implementation of *ABC* required legislation to give effect to the right to lawful abortion where there was a risk to a woman's life.[710] While inaction followed all of the prior State-commissioned reports on abortion, both Savita's death and the gravity of the European judgment meant that this report could not be shelved. In December 2012, the Government announced that it would enact legislation to implement *ABC*. Following two sets of parliamentary hearings,[711] the Protection of Life During Pregnancy Act was signed into law in July 2013 and came into force on January 1, 2014.

The law implementing *ABC* did not liberalize Ireland's abortion restrictions in any way. The Act clarified, in regulatory form, the single recognized exemption to Ireland's abortion. Arguably the Act made the process of getting a life-saving abortion more difficult—it set out a cumbersome assessment process whereby both an obstetrician and a specialist had to certify the risk to a woman's life, and in the case of suicide risk, two psychiatrists and an obstetrician were required. Additionally, the Act included a penalty of up to 14 years imprisonment for a woman procuring an abortion or anyone helping a woman to access an abortion in anything other than the prescribed circumstances. In short, Ireland retained one of the most restrictive abortion prohibitions in the world. Nonetheless, the introduction of a legislative framework to provide for legal abortion in Ireland, albeit in limited and highly medicalized circumstances, was a historic move. For more than 35 years, successive governments had avoided or side-stepped (e.g., by holding a referendum to further restrict abortion access) legislating on the 8th amendment. There had been an almost total political paralysis (Deputy Clare Daly's bill being the exception) due in part to the culture of fear and toxicity that surrounded abortion in Ireland. Even when national polls in the late

[708] Clare Daly, *Ireland's First Abortion Legislation in* THE ABORTION PAPERS IRELAND: VOLUME 2, 262 (Aideen Quilty ed.). For example, though he ultimately voted against the bill, the Minister for Equality and Justice at the time, Alan Shatter, stated that "It can truly be said that the right of pregnant women to have their health protected is, under our constitutional framework, a qualified right, as is their right to bodily integrity. This will remain the position. This is a Republic in which we proclaim the equality of all citizens, but it is a reality that some citizens are more equal than others." Alan Shatter, Dáil Debates, Vol 340 No. 3 Col. 533.
[709] Health Service Executive. Final Report: Investigation of Incident 50278 from time of patient's self-referral to hospital on October 21, 2012, to the patient's death on October 28, 2012. http://www.hse.ie/eng/services/news/nimtreport50278.pdf.
[710] Report of the Expert Group, *supra* note 703.
[711] Joint Oireachtas Committee on Health and Children, *Report on Public Hearings on the Implementation of the Government Decision Following the Publication of the Expert Group Report on A, B, & C v Ireland*, January 2013, http://www.oireachtas.ie/parliament/oireachtasbusiness/committees_list/health-and-children/.

2000s began showing evidence that the public desired reform, the legislature would not touch the 8th amendment to liberalize abortion access.[712]

ABC helped bring about the first occasion in the existence of the Irish State that the legislature recognized a woman's right to abortion (albeit in highly restrictive circumstances). In this way, the case fits the 'top-down' model of international human rights law impact, whereby the state adjusted its behavior in line with its international human rights obligations when pressured to do so by an oversight body. The 'change in behavior' was limited, but it was a focal legal development on the road to repealing the 8th.

3. *Structural role*

Though grassroots pro-choice organizations formed and disbanded during referendum campaigns, the IFPA was essentially alone actor amongst Irish civil society advocating for abortion rights in the 2000s.[713] During the *ABC* litigation, the only domestic group that the IFPA succeeded in rallying to make an amicus submission to the Court was the informal group 'Doctors for Choice.'[714] The traditional Irish human rights organizations such as Amnesty Ireland and the Irish Council for Civil Liberties generally avoided abortion, arguably out of concern that they might lose support (including funding) for their more traditional human rights campaigns if they were seen to be campaigning for abortion.[715] Even women's rights organizations, such as the National Women's Council of Ireland, reportedly held an ambivalent stance towards abortion.[716] Similarly, the Irish Human Rights Commission did not advocate for change to Ireland's abortion law.[717]

Post-*ABC*, the landscape began to change—slowly at first. In 2011, the Irish Council for Civil Liberties campaigned for abortion access for the first

[712] Interview with Deputy Jan O'Sullivan, June 26, 2019.
[713] This does not mean that resistance to the state's abortion ban was absent in Ireland. Volunteer groups such as the Abortion Support Network and the Irish Women's Abortion Support Group (along with the IFPA) assisted thousands of women with the stress, expense, and logistics of travel but did not yet advocate for reform publicly. *See* LINDSEY EARNER-BRYNE, THE IRISH ABORTION JOURNEY, 1920–2018, 112 -118, 36.
[714] Interview with Ms. Julie Kay, *supra* note 662. The Center for Reproductive Rights also submitted an amicus brief. For the submission, s*ee* Doctors for Choice and BPAS, *Submission to the European Court of Human Rights in ABC*, (2009) http://doctorsforchoiceireland.files.wordpress.com/2014/06/abc_brief_bpas_and_dfc.pdf.
[715] This was suggested in an interview by Colm O'Gorman, CEO, Amnesty Ireland. He also explained that Amnesty Ireland declined to work on abortion even though, at the global level, in 2007, Amnesty International adopted a policy calling for safe and legal abortion for women and girls in cases of pregnancies that posed either a risk to the life or health of the woman or girl, in cases of pregnancies resulting from rape or incest, and in cases of fatal fetal abnormality. Interview with Colm O'Gorman, June 16, 2019 (notes on file with author).
[716] During an interview with Jacqueline Kennedy, (former) Women's Health Officer with National Women's Council Ireland, she revealed that the organization's pro-choice position developed very gradually over time: "We have groups all around the country, urban and rural and … it has involved much discussion and consideration." Interview with Jacqueline Kennedy, National Women's Council, June 12, 2016 (notes on file with author).
[717] During an interview with a former NHRI commissioner (who did not consent for their name to be used), the commissioner disclosed that this was due to the personal opposition of some members of the commission.

time at the international level using the UPR process[718] to successfully convince six States to recommend that Ireland "introduce legislation to implement the judgment of the European Court of Human Rights in the *A, B and C v. Ireland* case, in order to clarify the circumstances in which abortion may be lawful."[719] At a public meeting in Dublin in July 2012, 40 young women and men laid the foundations for the first all-Ireland grassroots pro-choice organization that would become known as the Abortion Rights Campaign (ARC).[720] In a marked difference from past activism, members put the word "abortion" front and center in their new organization's name. They also adopted an explicitly intersectional approach in their work for "free, safe, legal abortion" across Ireland.[721] In contrast to the contention that rights-based advocacy is often overtaken by elites and supplants community organizing,[722] ARC bridged Ireland's vaunted urban-rural divide and built non-hierarchal local groups across the country. Similar to the pro-active approach of the IFPA, ARC considered their abortion rights work as being a "forward-oriented claiming of rights," in contrast to the reactionary protests following the "alphabet soup" of tragedies caused by the 8th amendment.[723] ARC's vision was that the law needed to "#trustwomen."

An unexpected event changed the course and force of the nascent abortion rights movement. The death of Savita Hallapanvar on October 12 at the hands of Ireland's abortion law provoked shock and outrage throughout the country. Though many argued that it was Savita's infection, not Ireland's law, that caused Savita's untimely death, for thousands of people (including those who investigated her death on behalf of the state), the culpability of the Irish 8th amendment was clear. Twenty thousand people took to the streets in a 'Never Again' march to call for reform of Ireland's abortion law on November 17, 2014. And in addition to generating support for activism among individuals, her death forced the Government to move forward on implementing *ABC* via the Protection of Life During Pregnancy Act. Savita's death ultimately propelled the strategies being pursued by advocates within the IFPA, ARC, and independent campaigners to a scale that could likely not

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[718] A State-driven process, under the auspices of the Human Rights Council, the Universal Periodic Review involves a review of the human rights records of all UN Member States by their peers, i.e., other UN member states.

[719] Interview with Deirdre Duffy, Former Advocacy Director, ICCL (notes on file with author)

[720] Anna Carnegie & Rachel Roth, *From the Grassroots to the Oireachtas: Abortion Law Reform in the Republic of Ireland*, 21 (2) HEALTH & HUM. RTS. J. 109, 110 (2019).

[721] The ARC Values & Inclusivity Statement outlined that the group aspires "to be inclusive and representative of the varied groups of people affected by Ireland's restrictive abortion laws. We believe this requires a particular focus on those groups that are disproportionately affected by these laws, including women who are marginalized by poverty, racism, immigration status, and disability." Abortion Rights Campaign, *ARC's Values & Inclusivity Statement,* https://secretweb1337tbh.abortionrightscampaign.ie/2016/11/21/abortion-rights-campaign-values-and-inclusivity-statement/.

[722] S*ee, e.g.,* Wendy Brown, *Suffering Rights as Paradoxes*, 7(2) CONSTELLATIONS 208.

[723] Interview with Sineád Corcoran, ARC, January 4, 2016; Interview with Katie Gillum, ARC, June 19, 2016. For commentary on this march, *see* a, Deputy Clare Daly, *Statements on the Referendum*, (May 29, 2018) *available at* https:// www.Oireachtas.ie/en/debates/debate/dail/2018-05-29/15/.

otherwise have been reached.[724] It enabled abortion rights campaigners to step over the threshold into the public domain.

As the Dáil prepared to legislate to implement the decision in *ABC* in 2013, ARC, IFPA, and many other grassroots advocates targeted both the legislature and the public to support the Protection of Life During Pregnancy Act. Though such activists supported the legislation, many made clear that while historic, the Act fell far short of what was needed to secure reproductive rights for women in Ireland. Following the passage of the Act, Ailbhe Smyth, a leading figure in Ireland's Marriage Equality campaign[725] and longstanding feminist activist, coordinated 12 groups to form the Coalition to Repeal the Eighth Amendment (the Coalition) with one shared goal — to repeal the 8th.[726] The nascent Coalition did not call for "free, safe and legal" abortion access; rather, its founders sought to bring together organizations that were pro-choice and those not explicitly pro-choice but who agreed that a referendum should be held.[727] Within twelve months, the Coalition had grown to a network of almost 100 organizations, including political parties, trade unions, and activists who called for a referendum to "protect and respect women's lives, health, and choices."[728] Notably, five years later, the Coalition included over 300,000 people.

Adopting a narrower advocacy goal, the activist group 'Terminations for Medical Reasons (also known as *Leanbh Mo Chroí*) emerged in response to the failure of the 2013 legislation to include a right to abortion for women with non-viable pregnancies. Made up of parents who had traveled to the UK to abort non-viable pregnancies, the activists began to publicly share their stories of heartbreak and implored the Government to "stop punishing tragedy."[729] And as will be described, one founding member, Amanda Mellet, contested Ireland's abortion ban and the suffering it forced upon her at the United Nations.

At the annual general meeting of Amnesty Ireland in 2013, one of the most respected human rights organizations in the country, the majority of members voted to campaign for abortion law reform. The following year, it launched it's national 'My Body, My Rights campaign, which advocated for

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[724] *See, e.g.*, Cathie Doherty and Sinead Redmond, *The Radicalisation of a New Generation of Abortion Rights Activists, 270* in THE ABORTION PAPERS IRELAND: VOLUME 2 (2015).

[725] The 34th Amendment, or Marriage Equality Act, was added to the Constitution of Ireland following a public referendum held on May 22, 2015, that passed with a 62.07% "yes" vote. The Amendment allows for marriage contracts without distinction as to the sex of either party.

[726] *See, e.g.*, www.repeal8.ie. Interview with Ailbhe Smyth, Coalition to Repeal the 8th Amendment, June 2, 2016 (notes on file with author).

[727] Interview with Sinead Kennedy, Coalition to Repeal the 8th Amendment, June 8, 2018 (notes on file with author).

[728] *Id*.

[729] Kathy Sheridan, '*I Believe in a Loving God and that I won't be Damned for what I Did*' THE IRISH TIMES (April 17, 2012) https://www.irishtimes.com/life-and-style/people/i-believe-in-a-loving-god-and-that-i-won-t-be-damned-for-what-i-did-1.502988.

abortion access in Ireland in line with international human rights standards: decriminalization of abortion and legalization in cases of risk to life and health or pregnancy that resulted from rape or carried a fatal fetal anomaly.[730] Notably, when *Amnesty International* had voted to adopt a pro-abortion rights campaign—marking a change in policy for the international human rights organization — the Irish section members of Amnesty International had opposed this change.[731]

In 2014 the youth-led "socialist-feminist movement," Reproductive Rights Against Oppression, Sexism, and Austerity (ROSA), launched a campaign based on the premise that "abortion rights are women's rights" and called for abortion access based upon a woman's request. Taking inspiration from the reproductive justice movement in the US, their abortion rights campaign also included advocacy for full LGBTQ equality, free childcare, a reverse to all cuts to domestic violence and rape crisis services, equal pay, and State investment in public housing.[732]

The emergence of a multitude of new actors in the Irish abortion rights movement was an incidental gain of the *ABC* litigation in a number of ways.[733] For the mainstream organizations such as the Irish Council for Civil Liberties, calling for the implementation of *ABC* was a hook to address abortion as a human rights issue when lobbying at home, both to the Government and political parties.[734] For other groups, it was the two sets of hearings around the PLDPA in 2013 that had the most impact. For long-active campaigners, the hearings were welcome as the first time that *facilitating* abortion access was on the political and social agenda, and their public platform expanded as national reporters began turning to women's groups for their perspectives in a way that had never happened before. For many younger women, the hearings were the first time they experienced their reproductive rights being deliberated in a national forum, and they became mobilized by their outrage at the scenes of a primarily male Dáil contesting their rights.[735] For others, many of whom had suffered under the 8th amendment, the PLDPA raised their expectations that reform was possible, and such hope translated into a

[730] *See, e.g.*, www.mybodymyrights.i.e., Amnesty Ireland called for a 'human rights complaint' abortion law that extends access to terminations on the grounds above, but not beyond this. See also Amnesty Ireland, Submission to the UN Committee on Economic, Social and Cultural Rights, Session 55, 01 – 19 June 2015, https://www.amnesty.org/en/documents/eur29/1629/2015/en/. For the global campaign, see Amnesty International, *My life, my health, my education, my choice, my future, my body, my rights,* available, at amnesty.org/en/library/info/ACT35/001/2014/en.

[731] Interview with Colm O'Gorman, *supra* note 711.

[732] Interview with Steph Herold, ROSA, Dublin, July 5, 2016 (notes on file with author).

[733] On the incidental gains of strategic litigation, *see* Doug NeJaime, *Winning as Losing*, 96 IOWA L. REV. 941 2010-2011, and Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715, 730 (1992).

[734] Interview with Deirdre Duffy, (former) Deputy Director of the Irish Council for Civil Liberties, June 5, 2016 (notes on file with author).

[735] Interview with Ailbhe Smyth, Coalition to Repeal the 8th Amendment, Dublin, July 1, 2016 (notes on file with author).

growing number of activists.[736] While the number of women forced abroad for abortions remained unchanged by the implementation of *ABC*, the number of women and men who were willing to tackle this injustice grew.

Among the critiques of human rights advocacy that this chapter has briefly sketched is the claim that human rights rhetoric can cause advocates to miss possible alliances with other movements. Wendy Brown's thesis is that rights' claims are atomistic and alienate groups from one another; in turn, displacing, competing with, and rejecting other political projects.[737] In a similar vein, Moron Horowitz contended that the individual specific framework of rights "draws energy and imagination away from campaigns directed at structural change."[738] While the aim of this chapter is not to mount a defense against such theories, the arguments do not hold for the Irish abortion rights movement. In terms of the ability of human rights advocacy to engage broad audiences and connect with other social justice projects, it appears that the opposite was true. International human rights advocacy directly facilitated the creation of alliances and coalitions to strengthen the Irish abortion rights movement.

Prior to *ABC*, the IFPA was the only pro-choice group that had made submissions to UN Treaty Monitoring Bodies, drawing attention to the human rights impacts of Ireland's abortion restrictions.[739] When Ireland was examined by the Human Rights Committee in 2014, ten organizations made submissions calling for abortion law reform. For Ireland's review by the CEDAW Committee in March 2017, the IFPA worked within the Women's Human Rights Alliance—an umbrella group of non-governmental organizations that includes the Irish Council for Civil Liberties and the National Women's Council of Ireland—to make a collective submission to the Committee to make reproductive health services, including abortion "a key issue" at the State examination in Geneva.[740] Similarly, the Coalition to Repeal the 8th Amendment's report to CEDAW was submitted by a coalition

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[736] *Id.*

[737] Wendy Brown, "*The Most We Can Hope for . . .": Human Rights and the Politics of Fatalism* (2004) 103 SOUTH ATLANTIC QUARTERLY 451, 453; See also, Robin West, '*Tragic Rights: The Rights Critique in the Age of Obama'* 53 WILLIAM AND MARY LAW REVIEW 713 (2011).

[738] Morton Horwitz, *'Rights'* 23 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES L. REVIEW (1988) 393, 400.

[739] Comments of the Irish Family Planning Association in respect to the Third Periodic Report of Ireland under the International Covenant on Civil and Political Rights (ICCPR). *See, e.g.,* https://www.ifpa.ie/resources/submissions/; Committee on the Elimination of Discrimination Against Women, Concluding Observations: Ireland, CEDAW/C/IRL/4-5/CO.

[740] These groups included: Abortion Rights Campaign; Action for Choice; AIMS; Akidwa; Amnesty Ireland; Anti-Austerity Alliance; AntiRacism Network; Atheist Ireland; Choice Ireland; Cork Women's Right to Choose; Doctors for Choice; Galway Pro-Choice; Irish Council for Civil Liberties; ICTU Youth; Lawyers for Choice; Mandate; National Women's Council of Ireland; Northern Ireland Alliance for Choice; Parents for Choice; People Before Profit Alliance; Rape Crisis Network Ireland; Re(al) Reproductive Health ROSA; School of Social Justice, UCD; Socialist Party; Socialist Workers Party; TCDSU Repeal the 8th Campaign; TENI; TFMR Ireland; Trade Union Campaign to Repeal the 8th Amendment; The Workers Party; Union of Students in Ireland; United Left; and UNITE the Union.

of 77 diverse groups, including student groups, migrant rights groups, and unions.[741]

Accordingly, as well as providing important legal claims (discussed in the next section), the UN Treaty Monitoring Body reviews provided opportunities for coalition-building among advocates. The collaboration in preparation for and advocacy during the human rights reviews of Ireland by different UN Treaty Monitoring Bodies enhanced relationships between organizations, attracted new groups, and led to the co-development of strategies and ideas.[742] Beyond the Treaty Body reviews in Geneva, many of the same alliances collaborated at home to seek the implementation of the human rights bodies' recommendations and push for reform. In addition to continuing to advocate jointly and produce joint reports,[743] disparate actors pursued different tactics according to their strengths and resources.

A study of digital activism, particularly on Twitter in the Irish abortion movement, also suggests that the new alliances were expanded online.[744] Grassroots organizations used social media, in part, to highlight who their allies were, possibly to enhance their own legitimacy amongst the public. For example, newer organizations such as the Abortion Rights Campaign and the Coalition to Repeal the 8th frequently retweeted more established organizations such as the National Women's Council of Ireland (NWCI).[745] Retweeting statements and/or affirmatively supporting other organizations may also have helped maintain consensus amongst the different groups.

The collaborative human rights documentation and drafting was designed to provide evidence to the different UN human rights Treaty bodies about the harms of the 8th amendment, but the work itself reportedly impacted advocates' skills and capacity. Upon reflection after the referendum, advocates described how their persistent international and domestic advocacy around the UN Treaty Monitoring Body processes provided valuable training opportunities for hundreds of advocates.[746] Though resources were few, activists from numerous organizations were able to become highly skilled in legal and human rights argumentation by the time

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[741] Submission to the Committee on the Elimination of Discrimination Against Women by the Coalition to Repeal the 8th Amendment (February 2017) https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/IRL/INT_CEDAW_NGO_IRL_26353_E.pdf.

[742] *Id.* For more on using human rights processes and training, *see* Shai Dothan, *International Courts Improve Public Deliberation*, 39 MICH. J. INT'L L. 217 (2018).

[743] Interview with Therese Caherty, Congress of Trade Unions Ireland, June 2016 and June 2018. For examples of advocacy literature on which the groups coordinated, see Fiona Bloomer et al. *Abortion as a Workplace Issue: Trade Union Survey - North and South Of Ireland* UNITE the Union, Unison, Mandate Trade Union, the CWU Ireland, the GMB, Alliance for Choice, Trade Union Campaign to Repeal the 8th (2017). The Irish Family Planning Association coordinated with Akidwa to publish: *Sexual health and asylum: Handbook for people working with women seeking asylum in Ireland* (Irish Family Planning Association).

[744] Kate Hunt, *Twitter, social movements, and claiming allies in abortion debates*, 16(4) J. OF INFO. TECH. & POL. (2019).

[745] *Id.*

[746] Interview with Maeve Taylor, *supra* note 666.

the referendum campaign finally came around.[747] Advocates were confident in building on the criticisms that Ireland had received in international human rights institutions to make a convincing case for change locally. Additionally, many of their submissions focused on elevating women's stories about their experiences of pregnancy and abortion under the 8th amendment and included first-hand testimony in a deeply respectful way—a strategy that later became central to the abortion rights movement.[748]

Irish pro-choice advocates also forged transnational human rights networks that provided both material and status-based advantages for the movement. The Open Society Foundation and the Center for Reproductive Rights provided funding to ARC, Amnesty Ireland, the National Women's Council, and the Irish Council for Civil Liberties.[749] Transnational links provided solidarity to Irish campaigners who could be parlayed for advocacy goals. For example, in August 2017, when Ireland's Taoiseach, Leo Varadkar, visited Canada, advocates used Twitter to connect with reproductive rights activists in Canada, who in turn lobbied Prime Minister Justin Trudeau to raise the lack of abortion rights in Ireland with Varadkar. Trudeau explicitly urged the Irish Prime Minister to consider abortion "as a matter of human rights."[750] Through policy and advocacy, media, and communication, people in Irish diaspora communities, particularly younger women, lobbied their adopted States and the Irish State to support abortion rights reform in Ireland. Prominent among diaspora groups for abortion rights, the 'London-Irish Abortion Rights Campaign' invoked Ireland's contravention of international law standards in its advocacy submissions both to the Citizens' Assembly on the 8th amendment and to the British Irish Parliamentary Assembly (BIPA) in the UK.[751] Diaspora communities also helped amplify international attention on Ireland's abortion laws, including by organizing marches in support of the movement at home across world cities, including Berlin, Brussels, Toronto, New York, Melbourne, and

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[747] *Id.*

[748] Clodagh Schofield, *How powerful conversations won abortion rights in Ireland*, (September 18, 2018) available at https://mobilisationlab.org/stories/how-powerful-conversations-yes-ireland/.

[749] Interview with Laura Harmon, National Women's Council of Ireland, June 16, 2018.

[750] *See, e.g.,* Fiach Kelly *Trudeau urges Varadkar to see abortion as a 'fundamental right'* (August 21, 2017) https://www.irishtimes.com/news/politics/trudeau-urges-varadkar-to-see-abortion-as-a-fundamental-right-1.3192431.

[751] *See, e.g.,* https://londonirisharc.com/documents; *See, e.g.,* 31 https://static1.squarespace.com/static/581f830fbebafba66ba1a131/t/5e4538372ec53a0670bd6f4e/1581594680706/London-Irish+Abortion+Rights+Campaign+Submission+to+BIPA+Committee+D_14+Jan+2018.docx.pdf. London-Irish ARC also wrote a joint letter on behalf of the global network of members of the Irish diaspora who support removal of the 8th Amendment from the Irish Constitution to the Minister for the Diaspora, available at https://londonirisharc.com/repeal-london/dearminister.

London.[752] Later, the diaspora returned home in their thousands to cast ballots in the referendum.[753]

"*In what is becoming a familiar scene, the Irish state must once again answer to a UN committee as to why there has been no progress in ensuring the human rights of women and girls in Ireland are vindicated*."[754]

As the number and diversity of Irish pro-choice advocates engaging with UN human rights bodies increased, the *strength* and urgency of recommendations from the UN urging the state to address abortion rights increased. Pro-choice advocates gained increasingly expansive international human rights recommendations to support and *legitimate* their calls to repeal the 8th amendment.

The CEDAW Committee in 2005, and the Human Rights Committee in 2008, had expressed concerns regarding the highly restrictive circumstances under which women could lawfully have an abortion, but the recommendations were weak. CEDAW recommended a "national dialogue on reproductive health," and the Human Rights Committee called for a measure "to help women avoid unwanted pregnancies so that they do not have to resort to illegal or unsafe abortions that could put their lives at risk."[755] By 2014, the Human Rights Committee directly recommended that Ireland "revise its legislation on abortion, including its Constitution to provide for additional exceptions in cases of rape, incest, serious risks to the health of the mother, or fatal fetal abnormality."[756] The Committee also commented on the discriminatory impact of the Protection of Life During Pregnancy Act on women who were unable to travel abroad to seek abortions.[757] The following year (2015) the CESCR Committee specifically recommended that the Government hold a referendum "to revise its legislation on abortion, including the Constitution and the Protection of Life During Pregnancy Act

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[752] *See, e.g.*, Paddy Clancy, *Irish Diaspora want their say in Repeal the 8th abortion debate* IRISH CENTRAL (December 2, 2016) available at https://www.irishcentral.com/news/irishvoice/irish-diaspora-want-their-say-in-repeal-the-8th-abortion-debate; *see generally*, https://www.bbc.com/news/world-europe-37462862.

[753] *See, e.g.,* Lisa O' Carroll, *Irish abortion referendum: voters on both sides prepare to head home,* THE GUARDIAN (May 18, 2018) https://www.theguardian.com/world/2018/may/21/irish-abortion-referendum-expats-both-sides-head-home-vote.

[754] *See, e.g.,* Abortion Right Campaign spokesperson, Michali Hyams, available at, https://www.abortionrightscampaign.ie/2017/07/28/press-release-government-must-support-repeal-of-8th-amendment-in-order-to-meet-human-rights-obligations-says-abortion-rights-campaign-arc/.

[755] UN Human Rights Committee 'Concluding observations on the third periodic report of Ireland' UN Doc CPR/C/IRL/CO/3, 13.

[756] UN Human Rights Committee 'Concluding observations on the fourth periodic report of Ireland' (August 19, 2014) UN Doc CCPR/C/IRL/CO/4. *See also*, Anthea McTiernan *Irish solutions on women's rights not enough for the UN* (July 15, 2014), https://www.irishtimes.com/news/politics/irish-solutions-on-women-s-rights-not-enough-for-un-1.1867197.

[757] *Id.*

2013, in line with international human rights standards."[758] In February 2016, the CRC Committee's Concluding Observations called on Ireland to "decriminalize abortion in all circumstances."[759] And in 2017, the CEDAW Committee recommended that Ireland legalize the termination of pregnancy "at least in cases of rape, incest, risk to the physical or mental health or the life of the pregnant woman, and severe impairment of the fetus, and de-criminalize abortion in all other cases."[760]

Rather than expecting the Treaty Monitoring Bodies to coerce Ireland to comply with its human rights obligations, the advocates sought to "embarrass the State."[761] and legitimize their demands in the eyes of the Government.[762] Activists aimed to elevate the status—and acceptance—of their calls for liberalization at home, to elicit understanding that they were "not asking for something extreme, but that Ireland [was] extremely out of step with international standards."[763] And in contrast to the protracted processes involved with litigation, for local advocates, the UN review processes allowed for regular opportunities to keep "the [abortion] issue in the human rights context."[764]

International human rights groups supporting the national movement in Ireland similarly engaged with the Treaty Monitoring Body review processes but also embraced litigation as a strategy. Considering the legal and policy impacts of litigation to carry more weight Committee recommendations in Concluding Observations, the international NGO, the Centre for Reproductive Rights (CRR), hoped that the state's desire to comply with an international decision would outweigh its strong inclination against liberal abortion reform.[765] Choosing the UN Human Rights Committee as their venue, in part, out of fear that the European Court would rebuke their case,[766] in 2013, the CRR logged a case on behalf of Amanda Mellet - the Irish

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[758] UN CESCR Committee 'Concluding observations on the third periodic report of Ireland' (July 15 2015) UN Doc E/C.12/IRL/CO/3.

[759] Committee on the Rights of the Child, Concluding Observations on the Combined Third and Fourth Period Reports of Ireland, CRC/C/IRL/CO/3-4, March 1, 2016, ¶ 58(a), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/IRL/CO/3-4&Lang=En.

[760] Committee on the Elimination of Discrimination Against Women, 'Concluding observations on the combined sixth and seventh periodic report of Ireland' (March 3, 2017), UN Doc CEDAW/C/IRL/CO/6-7.

[761] On the role of 'naming and shaming' in prompting state compliance with human rights, see Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L. J. 487 (1997). *See also,* STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS 147 (1974) (describing the capitalization of advocates on the less formal and more political function of rights as "the politics of rights").

[762] *See generally*, Beth Simmons, *supra* note 145. *See also* Kal Raustiala, *Refining the Limits of International Law*, 34 GA. J. INT'L & COMP. L. 423, 429 (2006); Margaret E. McGuinness, *Exploring the Limits of International Human Rights* Law, 34 GA. J. INT'L & COMP. L. 393, 395 (2006).

[763] Interview with Deirdre Duffy, Deputy Director, Irish Council for Civil Liberties, June 16, 2016 (notes on file with author).

[764] Interview with Maeve Taylor, *supra* note 666.

[765] Interview with Leah Hoctor, Litigation Director, Centre for Reproductive Rights, Geneva, March 11, 2017 (notes on file with author).

[766] *Id.*

American woman who co-founded Terminations for Medical Reasons after travelling to England to abort a non-viable pregnancy.[767] The CRR felt that they could successfully frame Amanda's suffering at being unable to get an abortion in Ireland despite her pregnancy having a fatal fetal anomaly as a violation of the right to be free from cruel, degrading treatment.[768] Aware that Amanda's case presented a narrow and potentially sympathetic claim, their goal was to "push the jurisprudence in a way that would be domestically accessible and implementable."[769]

The CRR's hopes were realized. In June 2016, the Human Rights Committee held that Ireland's abortion ban had violated Mellet's right to be free from cruel, inhuman, and degrading treatment, right to privacy, right to seek and receive information, and right to equality before the law.[770] Mellet's case marked the first time that the UN Human Rights Committee found that a State's law on abortion (rather than its practice around the law or the actions of a third party) violated women's human rights.[771] The Government paid Amanda Mellet $30,000 in compensation. Siobhán Whelan's case the following year was near identical.[772] Ms. Whelan commented that she was grateful that the Committee recognized the human rights violations she had faced and that the state had provided reparations. But she emphasized that she had taken the case to bring about change and to move the Government to reform the law so that other women did not have to suffer.[773]

Evidence to support the notion that Government actors were directly influenced by the decisions or recommendations emanating from the successive UN bodies is mixed. In response to the decision in *Mellet v. Ireland,* for example, the then-Taoiseach, Enda Kenny, dismissed the Human Rights Committee's decision as "not binding" on the state and "not like the European Court."[774] At the same time, there is evidence that the UN-based human rights advocacy was productive from a legitimacy standpoint. In the aftermath of the country's financial crisis (2008-2012), Ireland was still rebuilding its international reputation; some advocates noted the concern amongst politicians that condemnation from international human rights bodies contravened this progress and this provided openings in their

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[767] *supra* note 755.
[768] Interview with Leah Hoctor, *supra* note 766.
[769] *Id.*
[770] *Mellet v. Ireland*, *supra* note xx
[771] *See also* Center for Reproductive Rights, *Ireland must legalize abortion to end violations of women's human rights* (2006), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/GLP_Europe_MelletvIreland_FS_09%2006_Web.pdf.
[772] *Whelan v. Ireland*, *supra* note xx
[773] *See*, Pat Leahy, *Woman, paid €30,000 over having to travel for abortion* https://www.irishtimes.com/news/politics/woman-paid-30-000-over-having-to-travel-for-abortion-1.3283416.
[774] Pat Leahy, *UN abortion ruling is "not binding," Enda Kenny says* Irish Times (June 15, 2016) available at http://www.irishtimes.com/news/politics/un-abortion-ruling-is-not-binding-enda-kenny-says-1.2684762.

advocacy.[775] ARC recognized the limitations of soft law measures but leveraged the authority of international human rights jurisprudence in their advocacy.[776] Maeve Taylor of the IFPA reflected on how Ireland's then Minister for Justice, Frances Fitzgerald, a former director of the National Women's Council, appeared visibly embarrassed as she defended the state's position on abortion before the Human Rights Committee.[777]

UN human rights bodies' supportive recommendations also served to legitimize the demands of legislators who were allies to the reform movement. In 2016, the Children's Minister, Katharine Zappone—an independent TD who at the time supported the minority Government in exchange for the Government's commitment to consider a referendum on the 8th amendment—capitalized on the UN's ruling in *Mellet* to pressure her fellow cabinet members to discuss the decision and to progress in setting up the promised assembly.[778] Notably, Minister Zappone was experienced in deploying international human rights as a strategy to advance social change in Ireland. In 2003, together with her wife Ann Gilligan, Minister Zappone had contested, through domestic litigation, the state's failure to recognize their same-sex marriage (which had taken place in Canada). In the course of litigation, Zappone and Gilligan highlighted Ireland's international human rights obligations to recognize family types beyond those based on heterosexual marriage.[779] Though she was ultimately unsuccessful in her bid for recognition of same-sex unions in the Irish Courts in 2003, she prevailed in her attempts to force movement on abortion law reform at the cabinet-level. A week post-*Mellet,* the Government announced that it would commence the process of setting up the Citizen's Assembly, and less than a month later, in July 2016, the Oireachtas voted to establish the assembly—made up of 99 randomly selected individuals—to deliberate on a number of issues, including the 8th amendment.[780]

The members of the Citizen's Assembly heard evidence from a number of experts covering legal regulation of abortion in Ireland and internationally, the intricacies of constitutional law, the relationship between domestic law and international human rights law, the experience of medical practitioners

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[775] *See, e.g.,* Amelia Gentlemen, *UN Calls on Ireland to Reform Abortion Laws After Landmark Ruling*, The Guardian (June 9, 2016) https://www.theguardian.com/world/2016/jun/09/ireland-abortion-lawsviolated-human-rights-says-un (quoting Colm O'Gorman, Executive Director of Amnesty International Ireland). *See also:* Sarah Bardon et al, *UN criticism of abortion regime to be taken seriously, Fitzgerald says*, Irish Times (June 9, 2016) available at http://www.irishtimes.com/news/politics/un-criticism-of-abortion-regime-to-be-taken-seriously-fitzgerald-says-1.2678763.

[776] Interview with Michael Haymes, Abortion Rights Campaign, March 2, 2017 (notes on file with author).

[777] Statement made by Maeve Taylor, Advocacy Director, Irish Family Planning Association, Abortion and Reproductive Justice - the Unfinished Revolution II' Conference, June 3, 2016.

[778] *See, e.g.,* Ellen Coyne, *'Action must be taken on UN abortion ruling'* The Times (June 14, 2016) *available at https://www.thetimes.co.uk/article/action-must-be-taken-on-un-abortion-ruling-n752s6kjh.*

[779] *Zappone & Gilligan v. Revenue Commissioners & Ors* [2006] IEHC 404.

[780] *See, e.g.,* Luke Field, *The abortion referendum of 2018 and a timeline of abortion politics in Ireland to date*, 33(4) Irish Political Studies 609 (2018).

in the UK treating women from Ireland who access abortion in England, ethicists, pro-choice and anti-abortion advocates, and (anonymized and recorded) testimony from women who had accessed abortion and from women who had decided not to.

Later, in 2018, as the Government and legislature considered to undertake the actual work of reform and determine the wording of the referendum question and legislation to follow repeal,[781] legislators sought advice on Ireland's human rights obligations from international human rights lawyers and the Irish Human Rights Committee. More significantly, the argument that international human rights law required constitutional change appears to have been significant for the Joint Oireachtas Committee in reaching its conclusions in consideration of the Assembly's Report.

There is also evidence that the legitimatization of pro-choice advocacy impacted activists personally, as well as politically. Though not related to international human rights advocacy *per se*, as Michael McCann suggests in his book, *Rights at Work*, making legal claims and taking part in political struggle influences how individuals perceive themselves. Legal mobilization can enable advocates to feel more entitled and empowered. [782] For many involved in the Irish abortion rights movement, the recognition by international human rights bodies that Irish law violated their human rights impacted their confidence, resilience, and even identity. Post-referendum, newspapers depicted open pride in the nation's vote, but for decades before, activism for abortion rights was taboo. Many activists, even right up to the referendum, we're hesitant to tell their families about their campaign work, fearful of stark disapproval. Others became distanced from their families.[783] As one volunteer with ARC stated: "I feel as though my work has been validated. All of a sudden, abortion isn't taboo. It is a human rights issue. I tell my family about it."[784]

4. *Framing*

Though the movement's first proactive foray into international human rights advocacy in *ABC* was in large part unsuccessful, the litigation, and advocacy surrounding it, influenced the dialogue on abortion reform in Ireland in a significant way. At the parliamentary level, as discussed in Chapter 1, from the 1980s onwards, political discussion on abortion had generally been confined to consideration of whether and how to heighten restrictions on abortion access. Moreover, the tenor of abortion debates was

[781] *See supra* note 199 and accompanying text (discussion of the deliberations of the Joint Oireachtas Committee in 2017 and 2018).
[782] *See, e.g.*, MICHAL MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (2004).
[783] Interview with Vicky Conway, Lawyers for Choice, July 2, 2016 (notes on file with author).
[784] Interview with Sinead Corcoran, ARC, January 4, 2016 (notes on file with author).

generally wrought with hostility. such that divisiveness of discussion on abortion was cited by parliamentarians as one of their reasons for inaction. Politicians consistently balked at a discussion on abortion law reform, in turn, maintaining the idea that abortion was too sensitive and too controversial a topic for the legislature to reasonably deal with.

Legislating for *ABC* demanded parliamentary action on abortion, notably in a way that discussed access to abortion as a *right* (albeit limited to a right to keep women alive). The emotive tenor was far from fully dissipated, but the hearings differed from the parliamentary debates that had gone before. The Oireachtas invited the Irish Council for Civil Liberties to comment on Ireland's obligations under the European Convention.[785] The National Women's Council submission invoked statements by the UN Special Rapporteur on the Right to Health criticizing the criminalization of abortion in Ireland.[786] More generally, from this point onwards in Ireland's abortion law trajectory, "women's human rights" was among the frames used by parliamentarians to discuss abortion.

Additionally, both the institutions of human rights law and its content provided the abortion rights movement with significant opportunities to communicate specific harms of the 8th amendment to both domestic and international bodies. In making submissions via individual complaints and the Treaty Monitoring Body processes, advocates documented the testimony and experiences of women and their healthcare providers in a way that had not been done before.[787] Irish women's experiences of the 8th amendment had largely been "out of sight, out of mind." Women went to England for abortions legally but in secret.[788] Now advocates translated those silenced experiences into a body of evidence that the 8th amendment violated human rights and needed to go. As successive UN Treaty Monitoring Bodies made the same, or similar recommendations, calling on Ireland to liberalize its laws and to protect women's rights, abortion-seeking women were no longer

[785] Presentation by Dr. Alan Brady, ICCL, Houses of the Oireachtas Joint Committee on Health and Children. Report on public hearings on the implementation of Government decision following the publication of the expert group report on *A, B, and C v. Ireland*. Available at http://www.oireachtas.ie/.

[786] *See, e.g.*, *Report on Health Hearings on the implementation of the Government decision publication of the expert group report on* A, B, and C v. Ireland 430, available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/31/joint_committee_on_education_and_social_protection/reports/2013/2013-02-04_report-on-health-hearings-on-the-implementation-of-the-government-decision-following-the-publication-of-the-expert-group-report-on-a-b-c-vs-ireland-volume-one_en.pdf.

[787] Interview with Linda Kavanagh, ARC, June 17, 2018.

[788] It can be argued that the paucity of women's voices created a vicious cycle. As described by the former Special Rapporteur on Health, "...the stigma perpetuates the notion that abortion is an immoral practice, which then reinforces the continued criminalization of the practice." See Special Rapporteur of the Human Rights Council on Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Interim Rep.* 11 ¶ 35 (2011), *transmitted by Note of the Secretary-General*, U.N. Doc. A/66/254 (August 3, 2011) (by Anand Grover), http://www.acpd.ca/wp-content/uploads/2012/08/SR-Right-to-Health-Criminalization-of-SRHR-2011.pdf.

"fallen women"[789] but were rights holders with a claim on the state. Indeed, certain advocates commented that often the impact of their international advocacy was a lot less about what the international bodies said and more about the personal stories of women that entered the public domain.[790] Abortion moved from being a peripheral subject spoken about in hushed tones to a national question of human rights and how the state treated women. As one advocate put it:

> The Irish public, many of whom first encountered abortion via screenings of '*The Silent Scream*'[791] Within their Catholic-run schools, were now opening up national broadsheets to see that the UN has described Ireland's abortion ban as a violation of women's rights.[792]

Engaging both state actors and the public in a new discourse on abortion, international advocacy provided the movement with many of the advantages that scholars attribute to international human rights-based 'framing':[793] educating the public, producing a new way of understanding the issue, and offering captivating narratives.[794] Advocates commented that international advocacy facilitated creative media messaging that could both chastise the state and mobilize sympathetic audiences.[795] In 2014, the Chair of the Human Rights Committee asserted that Irish law treated women who were victims of rape "as a vessel and nothing more." His observations attracted national media attention, and ARC capitalized with the hashtag #NotAVessel on social media. This slogan quickly gained traction, with women all over the world posting pictures of themselves proclaiming "I am #NotAVessel."[796]

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[789] Term taken from CAELAINN HOGAN, REPUBLIC OF SHAME: STORIES FROM IRELAND'S INSTITUTIONS FOR 'FALLEN WOMEN' (2020).

[790] Interview with Leah Hoctor, Centre for Reproductive Rights, Geneva, March 11, 2017 (notes on file with author).

[791] '*The Silent Scream*' is a 1984 anti-abortion educational film that was produced in the U.S. in partnership with the National Right to Life Committee.

[792] Interview with Michael Hyams, ARC, Jan 2016, 2016 (notes on file with author).

[793] In social movements' research, framing describes how activists present their cause and articulate the perceived injustices in their efforts to bring about change. *See*, Robert D. Benford and David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment* 26 *ANNUAL REVIEW OF SOCIOLOGY* 611, 663 (2000).

[794] *See*, *e.g.*, Rosa Ehrenreich Brooks, *Feminism and International Law: An Opportunity for Transformation*, 14 YALE J.L. & FEMINISM 345, 356 (2002) ("Rights-based narratives are not the only powerful narratives—and in some cultural contexts they may be much less effective than in others—but for many of the world's women, they offer the best way to buttress arguments for change."); Elisabeth Jay Friedman, *Bringing Women to International Human Rights*,18(4) PEACE REVIEW: J. OF SOC. JUSTICE 480 (2006).

[795] *See*, *e.g.,* Sinead Corcoran et al, *"I'm #NotAVessel: The impact of grassroots pro-choice activism on Ireland's UN treaty monitoring body examinations*," Irish Community Law Development Journal 5/2 (2016), pp.25.

[796] *Id.*

In addition to discursive advantages, scholars demonstrate that human rights framing can be crucial for its legal authority.[797] Such was the case for the Irish abortion rights movement. Advocates articulated a variety of claims in terms of human rights law. When addressing the Human Rights Committee in 2014, advocates were able to build on *ABC* to underscore that the Protection of Life During Pregnancy Act was not a solution for women's human rights. Given that the Act only addressed the situation of women whose pregnancy posed a serious risk to life, advocates argued that Ireland's ban on abortion access in cases where there was a risk to a woman's physical or mental health, where the pregnancy was the result of a crime or where there was a serious fetal anomaly, interfered with women's rights to be free from cruel, inhuman and degrading treatment and the right to life under the Covenant.[798] In their submissions to the CEDAW Committee, advocates used public health evidence to underscore that the state violated Article 12 (the right to health) of women in Ireland by imposing an unsound distinction between risk to the life of a pregnant woman and risk to her health,[799] and by imposing onerous barriers to abortion access in cases of suicide.[800] Advocates emphasized that "abortion needed to be taken out of the criminal law and addressed as part of an integrated approach to women's reproductive health."[801] Similarly, when engaging with the CESCR Committee[802] and the

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[797] S*ee, e.g.,* Maria Foscarinis, *The Growth of a Movement for a Human Right to Housing in the U.S.*, 20 HARV. HUM. RTS. J. 35 (2007) and Maria Foscarinis and Eric Tars, *Housing Rights and Wrongs: The U.S. and the Right to Housing*, in HUMAN RIGHTS AT HOME, (Cynthia Soohoo, Catherine Albisa and Martha Davis eds. 2007) (describing how framing homelessness as a human rights violation has helped add legal content to the movement's advocacy for policy changes in the U.S.). *See generally*, David Landy, *Talking Human Rights: How Social Movement Activists Are Constructed and Constrained by Human Rights Discourse*, 28 (4) INTERNATIONAL SOCIOLOGY (2013).

[798] *See, e.g.,* Irish Family Planning Ass'n, *Comments of the Irish Family Planning Association (IFPA) in Respect of the Fourth Periodic Review of Ireland Under the International Covenant on Civil and Political Rights (ICCPR)* 7 (2014), http://www.ifpa.ie/sites/default/files/documents/submissions/irish_family_planning_association_re_4th_periodic_review_of_ireland.pdf; Irish Family Planning Ass'n, *Letter to assist the Pre-Sessional Working Group of the Human Rights Committee (HRC) in its review of the State Party's compliance with the International Covenant on Civil and Political Rights (ICCPR) and the adoption of the list of issues for review* (August 2013); Abortion Rights Campaign, *Comments of the Abortion Rights Campaign in Respect of the Fourth Periodic Review of Ireland Under the International Covenant on Civil and Political Rights (*ICCPR) (June 12, 2014); Women's Human Rights Alliance, *Comments of the Women's Human Rights Alliance to the Human Rights Committee in Respect of the Fourth Periodic Review of Ireland Under the International Covenant on Civil and Political Rights* (ICCPR) (2014), (on file with author).

[799] *See, e.g.,* Comments of the Irish Family Planning Association (IFPA) in Respect of the Combined Sixth and Seventh Periodic Review of Ireland Under the CEDAW Convention (2017), https://www.ifpa.ie/sites/default/files/irish_family_planning_association_submission_to_cedaw_january_2017_1.pdf; *See also*, Comments of the Irish Human Rights and Equality Commission to the United Nations Committee on the Elimination of Discrimination Against Women on Ireland's Combined Sixth and Seventh Periodic Reports (on file with author).

[800] Abortion Rights Campaign, *Comments of the Abortion Rights Campaign to the Pre-sessional Working Group of the CEDAW Committee* (2015) (on file) [hereinafter, Abortion Rights Campaign, *Comments to CEDAW*; National Women's Council Oral Statement to the Pre-Sessional Working Group of the Committee on the Elimination of Discrimination Against Women (CEDAW) https://www.nwci.ie/learn/article/oral_statement_to_the_pre_sessional_working_group_of_the_committee_on_the_e.

[801] *id.* Abortion Rights Campaign, *Comments to CEDAW.*

[802]*See, e.g.,* Abortion Rights Campaign, Comments of ARC to UN Committee on Economic, Social and Cultural Rights (2015) https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/IRL/INT_CESCR_ICO_IRL_18452_E.

Committee on the Rights of the Child, advocates highlighted Ireland's non-compliance with the Convention where a woman faces a risk to her health and requires access to abortion.[803] And following the HRC's decision in *Mellet*, advocates emphasized that Ireland had still not taken action to comply with the decision by holding a referendum and legislating for abortion access for women whose pregnancies had fatal fetal abnormalities.[804]

The disproportionate impact of Irish abortion law on "vulnerable women" or "marginalized women" featured as a prominent theme in advocates' human rights submissions. The label "vulnerable women" was code for women living in poverty, asylum seekers, and minors in the care of the state, i.e., women for whom travel was laden with barriers, some of them insurmountable. Exposing multiple barriers that women in poverty and/or immigrant women faced in accessing abortion, the movement drew attention to the intersection of needs of women in Ireland. ARC and the IFPA collaborated with Akidwa (Ireland's National Network of Migrant Women) to support migrant women's groups in developing submissions on their challenges. They drew upon the 'alphabet' of tragedies in Irish abortion law; Ms. Y, who had been raped but could not travel, and Ms. C, who had been raped and went the whole way to High Court to overcome the restrictions on her right to travel. Others explained how accessing the funds to cover flights, accommodation, transportation to and from the airport, and the abortion itself, was impossible for some women. Advocates highlighted the discriminatory impacts of the 8th amendment on women and girls in lower socio-economic groups.[805] Significantly, the state was forced to admit that it had "no solution" for women who were unable to travel for abortion.[806]

The Irish abortion rights movement elicited strong recommendations relating the state's responsibility to reform Irish abortion law from UN human rights bodies. Almost in unison, the UN human rights bodies outlined that to comply with its legal obligations, Ireland needed to hold a referendum to repeal the 8th amendment and legislate thereafter to legalize abortion in cases where abortion is necessary to preserve the life or health of the woman, where a woman is a victim of rape or incest or where the pregnancy was not viable. Though the views of such bodies are not binding on States under

[803] Maeve Taylor, *Women's Right to Health and Ireland's Abortion Laws*, 1 INT. J. OF GYNECOLOGY & OBSTETRICS 130, 132 (2015).
[804] *See, e.g.,* Siobhan Mullally, *Mellet v. Ireland: Legal Status of the UN Human Rights Committee's 'Views"* CCJHR BLOG (June 16, 2017) http://blogs.ucc.ie/wordpress/ccjhr/2016/06/16/mellet-v-ireland-legal-status-un-human-rights-committees-views-2/T.
[805] *See, e.g.,* IFPA, *Abortion in Ireland: Statistics*, https://www.ifpa.ie/Hot-Topics/Abortion/Statistics (last visited September 1, 2018). *See* also Ashley Kirk, *Nine a Day: The Women who Have to Travel for Abortion as Ireland Prepares for Referendum*, THE TELEGRAPH (May 24, 2018).
[806] Ronan Duffy *Ireland at the UN: We have 'no solution' for women who can't afford to travel for an abortion* (July 15, 2014) https://www.thejournal.ie/ireland-unhrc-day-twp-1572161-Jul2014.

international law, their views are treated as authoritative interpretations of binding treaty obligations.[807]

At another level, however, the scope of abortion reform recommended by the myriad human rights bodies was substantively limited. As set out in Part I of this chapter, international human rights standards on abortion access developed from a growing international concern that thousands of women were dying or suffering severe health complications from unsafe abortions. The law responded in two ways. First, it tried to ensure that women could access abortion where it was legal, i.e., where a State permits legal abortion domestically, human rights law is clear that States must put procedures in place to enable women to access a safe, legal abortion. The litany of cases in Part II (*KL, LMR, Tysiac, LC, P & S, RR, ABC, Mellet, Whelan, Beatriz,* etc.) demonstrate that under current international human rights law jurisprudence, States are culpable if individual service providers or a lack of medical guidelines impede a woman's access to abortion—if that state has *already* legalized abortion. If a State has not already legalized abortion, international human rights law recommends that States make exceptions to their restrictions to legalize access in cases where the life or health of the woman is at risk, if the pregnancy is the result of rape or if the pregnancy is not viable.

While such norms were initially very useful in providing legal and political legitimacy to advocates' calls for a referendum to repeal the 8th amendment, as the movement progressed towards a public vote in 2017 and 2018, international human rights law ran out as a resource.

To recap from Chapter 1, the Government officially committed to holding a referendum on Ireland's constitutional abortion law following the recommendation from the Citizen's Assembly in that it do so. Not only did the Committee recommend a referendum, but that the state move to permit abortion without restriction as to reason up to 12 weeks of pregnancy, allow abortion where there is a risk to life or of serious harm to health after 12 weeks but until fetal viability, and without gestational time limit where the fetus has a condition that means it is likely to die before or within 28 days of birth.[808] Only one human rights organization, Amnesty Ireland, addressed the assembly over its 25 meetings.

Fewer movement actors were content with the notion that reform would enable women to access abortion only in exceptional circumstances. The need for thousands of women to leave Ireland for abortion care would remain

[807] Art 38(1)(d) of the Statute of the International Court of Justice also provides that the views of experts are a subsidiary source of international law. Charter of the United Nations and Statute of the International Court of Justice, *entry into* force October 24, 1945, 1 U.N.T.S. XVI.

[808] Citizens' Assembly *First report and recommendations of the Citizens' Assembly: The Eighth Amendment of the Constitution* (2017) https://ptfs-oireachtas.s3.amazonaws.com/DriveH/AWData/Library3/CAdoclaid290617A_110031.pdf.

intact. 'Real world' access to abortion would remain heavily dependent on financial means, visa status, ability to travel, ability to take time off of work, the availability of childcare for the pregnant person's children, or the ability and willingness to order medication abortion online and take it illegally within Ireland. For many involved in the campaign over the decades, incremental and exceptions-based abortion law reform had never been their goal. The *ABC* had been initiated as a case to contest the discrimination caused to the diversity of Irish women, not just women in exceptional circumstances.[809] ARC's foundations committed to "free, safe, and legal abortion" for all women.[810] The IFPA was driven by the need to recognize the rights of women with "everyday abortion experiences."[811] Grassroots activists campaigned for a law that would end the exile of Irish women who wanted to control their reproductive autonomy. For thousands of women, the movement was a fight to demand that the State #trustwomen.

In this way, if strictly adhered to, human rights law had the potential to undermine the Irish abortion rights movement by tempering its ambitions and limiting their demands significantly. Strict compliance with international human rights law would have delivered a much more limited abortion right than what was sought and ultimately achieved by pro-choice campaigners.

Notably, as noted in the last section, when the Joint Oireachtas Committee on the Eighth Amendment had the opportunity to recommend whether Ireland should have a referendum on the 8th amendment, the Committee cited Ireland's international human rights obligations "as evidenced in the cases of *Mellet v. Ireland* and *Whelan v. Ireland*" among their reasons for recommending constitutional change.[812] However, an approach to abortion reform predicated upon compliance with *Mellet* and *Whelan* would only have required the state to guarantee access to abortion for women with non-viable pregnancies—a much narrower reform than that recommended by the Citizen's Assembly, which essentially called for a legal right to abortion, without restriction as to reason, within the first 12 weeks of pregnancy. If the Joint Committee had not also been presented with the Citizen's Assembly's recommendation,[813] perhaps the Joint Committee, and in turn, the

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[809] *See supra note 356.*

[810] *See, e.g.*, ARC Inclusivity Statement, *supra* note 136. *See also*, IFPA Submission to the Citizen's Assembly, *A health and rights approach to abortion in Ireland*, https://www.ifpa.ie/sites/default/files/ifpa_submission_to_the_citizens_assembly.pdf (outlining their position that an abortion law based on exceptions where a woman has been raped or received a diagnosis of severe or fatal anomaly, "would, in the same way, fail to meet the needs of the very group it aimed to serve").

[811] *See, e.g.*, Irish Family Planning Association, *Women Have Abortions Every Day: It's Just One Choice*, https://www.youtube.com/watch?v=R4SSHkgD73E.

[812] *See, e.g.*, Houses of The Oireachtas, *Report of The Joint Committee On The Eight Amendment Of The Constitution*, December 20, 2017, at 5, https://www.oireachtas.ie/en/committees/32/eighth-amendment-constitution [hereinafter, Oireachtas, *Report Of The Joint Committee*]

[813] *First Report And Recommendation Of The Citizens' Assembly, The Eight Amendment Of The Constitution*, June 29, 2017, https://www.citizensassembly.ie/en/The-Eighth-Amendment-of-the-Constitution/Final-Report-on-the-Eighth-Amendment-of-the-Constitution/Final-Report-incl-Appendix-A-D.pdf *See* Government Of Ireland Department

Oireachtas, would not have offered the Irish people the option to vote for unrestricted access to abortion in the first trimester in the 2018 referendum. In practical terms, the Government may have presented (and later enacted) a post-repeal abortion law that was far less progressive than what was published in March 2018.[814] If the primary impact of human rights advocacy had been to move the state to comply with its international human rights law standards on abortion, the Irish people might not have been able to vote in favor of a woman's right to abortion without restriction as to reason. Thousands of women in Ireland might still be travelling to the UK every year to realize their reproductive rights.

Interestingly, even though human rights law standards on abortion are actually quite conservative, when it came to the official referendum campaign in the eight weeks before the public vote, the Together for Yes campaign dropped the framing of abortion as a 'right,' believing this language to be too political.[815] Rather than articulating abortion as a human right for women, abortion was framed, primarily, as a *medical* need. The campaign's policy paper described the proposed law as a way for "women and girls to access the abortion services which they need, in a safe and regulated medical environment within the Irish health system."[816] There was little talk of 'trusting women', but much of trusting women *and their doctors*.[817] The dominant campaign message articulated that Repeal was about providing healthcare to women within the state's jurisdiction. Accordingly, the campaign leaned heavily on medical arguments for repeal, foregrounding supportive obstetricians and gynecologists as spokespersons.[818] With an undertone of paternalism, the message was that Ireland should be caring for *its* women at home. Additionally, campaign events foreground the stories of women and couples who had experienced a diagnosis of fatal fetal abnormality and had been forced abroad for an abortion. "Repeal," the refrain went, was a vote for "compassion and care for your sister, your daughter, your mother, or for your wife."[819] Civil society campaigners,

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Of Health, *General Scheme Of A Bill To Regulate Termination Of Pregnancy*, March 27, 2018, https://health.gov.ie/wp-content/uploads/2018/03/General-Scheme-for-Publication.pdf.

[814] *Id.*

[815] Interviews with the following in June 2016: Sineád Kennedy, Together for Yes; Laura Harmon, Niall Behan, the Irish Family Planning Association.

[816] Together for Yes, *Position on Bill to Regulate Termination of Pregnancy,* (April 5, 2018) https://www.togetherforyes.ie/12-weeks/.

[817] For example, during live TV debates, Together for Yes tweeted, "We need to trust women and trust doctors to do their jobs":https://twitter.com/Together4yes/status/989998165616185344.

[818] The support of the medical profession for reform is similar to the experience of the United States, where physicians feared criminal and civil liability because of the vague standards at work. *See* Reva B. Siegel, *Roe's Roots: The Women's Rights Claims that Engendered Roe*, 90 B.U. L. REV. 1875, 1884 (2010) [hereinafter Siegel, *Roe's Roots*]; BEFORE ROE V.WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 25 (Linda Greenhouse & Reva Siegel eds., 2010).

[819] *See, e.g.*, Senator Colette Kelleher, Seanad Debates, https://www.oireachtas.ie/en/debates/debate/seanad/2018-01-17/9/; Ivana Bacik, *Ireland's abortion referendum:*

politicians, and even celebrities who became voices for 'Yes' repeated this refrain. Emblazoned in bright colors across roadside posters, t-shirts, and campaign literature, a Yes vote was a vote for "compassion and care."

Market research conducted in 2016 had provided the impetus for the change in framing.[820] According to this research, the so-called 'middle ground' voters in Ireland (those who were seemingly not firmly in the 'pro-choice' or 'pro-life' camp) responded well to the reproductive health frame.[821] These 'middle ground' voters, also known as 'middle Ireland' or the 'concerned center,' felt emotionally torn; they wanted gradual change according to the focus group. And they wanted there to be a *reason* for an abortion. The involvement of doctors in the abortion decision was key. Together for Yes pitched their campaign of compassion and care to this constituency. Moving away from the themes of choice and rights, their narrative focused on women's health needs and the tragedies of the 8th—women with much-wanted pregnancies who had been diagnosed with a fetal anomaly; women who had been raped; women whose health was at risk.[822] The Director of the National Women's Council and co-chair of Together for Yes, Orla O'Connor, emphasized that "[f]or women it's (abortion), not a political issue. It's a personal and private one."[823]

For a movement that had consistently highlighted the impacts of the 8th amendment on women with multiple vulnerabilities in the international advocacy, immigrant women, traveler women, and black and brown women became almost invisible in official campaign activities during the referendum.[824] The messaging no longer detailed the struggles of the women who were most penalized by the law—migrant women, women in poverty, or children in care. Rather, it seemed as though the official campaign believed that the public could only be convinced to trust women who fitted traditional norms of respectability.

It is not clear whether the depoliticization of abortion rights was necessary to win the public vote. When 'Yes' voters were asked to name which factors were important to them in making their decision, the most important issues were the right to choose (84%), the health or life of the woman (69%), and

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why I'm campaigning for repeal The Conversation, (March 22, 2018) https://theconversation.com/irelands-abortion-referendum-why-im-campaigning-for-repeal-96938.

[820] Interview with Laura Harmon, Mobilization Director, Together for Yes (June 10, 2018) (explaining that in 2016, the National Women's Council had conducted focus group studies, paid for with funding from the Center for Reproductive Rights, which revealed that a less combative tone was preferable amongst middle-ground voters).

[821] Interview with Ailbhe Smyth, Co-chair, Together for Yes (June 16, 2018).

[822] *See supra* note 288 and accompanying text.

[823] *See e.g.* Pat Leahy, *Women's council appeals to 'middle ground' in abortion debate* Irish Times (November 13, 2017), https://www.irishtimes.com/news/politics/women-s-council-appeals-to-middle-ground-in-abortion-debate-1.3289391.

[824] Interview with Eileen O' Flinn, activist on behalf of Irish Travellers and women's rights, June 4, 2018.

pregnancy as a result of rape (52%).[825] Furthermore, when asked when they decided how to vote, 75% said they always knew; 8% said following the Savita Halappanavar case; 1% said following the Citizens' Assembly; 1% said following the Oireachtas committee, and 12% said during the Referendum campaign.[826]

This chapter examined how human rights-based activism for abortion law reform in Ireland helped Irish advocates unravel one of the most restrictive abortion laws in the world. Playing a formative role, the strategic decision of the IFPA in the early 2000s to focus on international human rights advocacy initiated the first proactive campaign for women's abortion rights in Ireland. Somewhat unique to Ireland, the international legal system provided a venue for legal challenge in a situation where the domestic legal system precluded legal action for abortion law reform. Though limited in terms of its recognition of substantive abortion rights, the outcome of the litigation campaign the European Court's 2010 decision in *A, B, and C v. Ireland* forced legislative action at home, compelling the Oireachtas to clarify the legal framework around access to abortion where a woman's life was at risk (the PLDPA). The death of Savita Halappanavar in 2012 was an unexpected, yet watershed, moment for the abortion rights movement and gave significant momentum to the emerging national mobilization against the abortion ban. The international human rights advocacy that followed both her death and the PLDPA was influential less in terms of its legal force, but by attracting new actors, creating opportunities for coalition building, and enhancing the legitimacy of the movement (particularly from 2012-2017), human rights activism had important structural impacts on the movement itself. And during those years, framing abortion as a human right helped shift both parliamentary and public discourse on abortion to discuss abortion denial as a potential violation of women's rights —a marked difference from the abortion debates in the 1980s, 1990s, and 2000s described in Chapter 1.

While this case study evidences significant institutional and analytical benefits that human rights strategies offered to the pro-choice movement, it suggests that the actual scope of international human rights law had the potential to constrain the liberalization of Ireland's abortion law. In protecting access for abortion in just a subset of cases, for a subset of women, international human rights standards did not reflect the full extent of the pro-choice struggle, nor the diversity of women who sought its protection. The next chapter, the final in this dissertation, probes the doctrinal underpinnings of this gap in human rights protection.

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[825] David McCullough, *Exit poll indicates large majority vote to change abortion laws* (updated May 30, 2018) https://www.rte.ie/news/politics/2018/0526/966120-eighth-amendment-referendum/.

[826] *See, e.g.,* Ian McShane, *Thirty-sixth Amendment to the Constitution Exit Poll (*May 25, 2018), RTÉ & BEHAVIOUR & ATTITUDES, https://static.rasset.ie/documents/news/2018/05/rte-exit-poll-final-11pm.pdf.

CHAPTER 3: GENDER BLIND: INTERNATIONAL HUMAN RIGHTS LAW ON ABORTION

Chapter 2 of this dissertation set out current international human rights law standards on abortion: the doctrine recognizes that in certain circumstances, denying women access to abortion can violate a woman's right to life, right to health, right to be free from cruel, inhuman and degrading treatment, right to privacy, freedom from discrimination in the context of the

right to health and freedom from socio-economic discrimination. In practical terms, this jurisprudence recognizes that States have a duty to decriminalize abortion and legalize abortion access in three situations: where a woman (and usually a number of medical or state officials) can show that abortion is necessary to preserve her life or health; where the pregnancy is the result of rape; or where the pregnancy has a fatal anomaly. Forged through impressive advocacy by reproductive rights groups, these doctrinal developments have been groundbreaking in numerous concrete ways. Across the world, lawmakers and judges have invoked these law standards to liberalize national-level laws and policies on abortion. [827] A number of international and multilateral organizations and agencies have referenced human rights standards in the technical guidance and recommendations they provide to States on women's health[828] and empowerment. Chapter 2 studied how international human rights law was a powerful lever for Irish abortion rights activists to drive political, social, and legal change — a phenomenon that is not limited to this jurisdiction.

Chapter 2 concluded, however, on a sober note that pointed to the limits of this jurisprudence. The international human rights framework provided formative legitimatizing, mobilizing, and institutional resources to the Irish abortion rights movement, but it was not a panacea. The case study highlighted that the scope of international legal protection for abortion rights fell short, far short of the emancipatory goals of the Irish movement. If Irish lawmakers had directly mirrored human rights law when legislating for reform, only a slightly improved abortion law would have followed the repeal of the 8th amendment. Rather than legal availability upon request within the first 12 weeks of pregnancy, women may only have been entitled to an abortion within the health-life-rape and FFA exceptions. As before repeal, women outside of those categories could have resorted to ordering abortion pills online or going abroad to access abortion, but that would hardly have been a revolutionary change for "Mná na hEireann."[829]

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[827] Courts in Argentina, Bolivia, Brazil, Colombia, South Korea, the UK, and Nepal have directly relied upon these standards in decisions to liberalize abortion laws; *See*, *e.g.*, Stefano Gennarini, *Court in Argentina Cites UN 'Experts' To Establish 'Right' to Abortion*, LIFESITE (January 9, 2014), https://www.lifesitenews.com/news/court-in-argentina-cites-unexperts-to-establish-right-to-abortion. Lawmakers in Spain, Ireland, Northern Ireland, Rwanda, Uruguay, and Peru have also invoked international standards to decriminalize abortion.

[828] WHO, SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS 1–2 (2d ed. 2012); *See also* UNFPA, *Sexual And Reproductive Health And Rights: An Essential Element Of Universal Health Coverage: Background document for the Nairobi summit on ICPD25 – Accelerating the promise* (2019) 34 https://www.unfpa.org/sites/default/files/pub-pdf/UF_SupplementAndUniversalAccess_30-online.pdf (outlining that "[o]ne essential legislative reform is to widen the grounds on which abortion is permitted" to ensure a "a comprehensive approach to sexual and reproductive health rights.").

[829] "Mná na hEireann" translates from Irish to English as "Women of Ireland." In popular lexicon, it is associated with a rallying cry for Irish women ever since its use by former President of Ireland, Mary Robinson, who, in her victory speech, gave special mention to Irish women "who instead of rocking the cradle, rocked the system."

As well as being limited in terms of the substantive rights offered, a closer look at human rights law jurisprudence on abortion[830] tellingly reveals a narrow understanding of the socio-political importance of abortion rights. Delinking abortion, for the most part, from gender equality, the doctrine fails to interrogate the gendered purposes and effects of abortion restrictions. One line of jurisprudence treats abortion regulation as a cultural issue of "domestic morality" that domestic powers can regulate with a significant degree of deference.[831] Under this model, abortion's status as a human right receives scant attention, and the gender discrimination inherent to abortion restrictions receives no attention at all. In other decisions, the law has been willing to recognize that denial of abortion rights by 'third parties, such as hospitals, doctors, or judges, interferes with women's rights. While these are welcome decisions in many regards, it enables the state to escape accountability for giving such the third parties power over women's decisions.

In addition to failing to contest the gendered roots of abortion denial, human rights law tends to obscure the gendered impacts of restrictive abortion regulation. By conceptualizing abortion denial primarily as an interference with the right to health, the right to privacy, and the right to be free from ill-treatment, human rights law has made powerful inroads in recognizing many of the human rights abuses women suffer when denied abortions. But this analysis appears to have come at the expense of sufficient recognition of the inequalities caused by abortion restrictive regulation. Even when the law recognizes the discriminatory impacts of abortion restrictions, the inequality is addressed as one of unequal access to healthcare, rather than the rejection of women's agency, autonomy, and equal position in society.[832] To be sure, abortion access *is* a reproductive health issue, and denial of a wanted abortion impedes a woman's right to health. Relatedly, abortion rights implicate many aspects of an individual's private life that should not be intruded upon by state actors. And without doubt, the experience of forced pregnancy can cause suffering that reaches the threshold of cruel, inhuman, and degrading treatment. But recognition of these harms should not be divorced from the understanding that abortion denial impairs the status of women as equals.

Finally, the human rights law understanding of abortion—again, as currently applied—is wanting from a gender perspective because the jurisprudence trades in narratives of women as powerless, tragic victims. A primary example is its "exceptions-based" approach to abortion. Affirmative

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[830] In analyzing human rights law's approach to abortion rights, the chapter primarily examines human rights law decisions, rather than recommendations emanating from UN Treaty Monitoring Body concluding observations. However, where the doctrinal approach of a human rights body differs in its decisions from its approach in concluding observations, the difference is acknowledged.

[831] *A, B, & C v. Ireland*, *supra* note 12, at ¶ 227.

[832] *See infra* note xx and accompanying notes.

abortion rights are recognized only in conditional (quite tragic) cases — where there is danger of maternal mortality, where the pregnancy is non-viable, or where the pregnancy is the result of rape or incest. The agentic women who *choose* abortion for reasons unrelated to the aforementioned tragedies are excluded from the law's protection. In this way, the law creates a hierarchy of rights-holders (and abortions) whereby only women who can engender compassion and sympathy are considered to be rights-holders. Moreover, the positioning of women as powerless victims risks inscribing the patriarchal vision of women as vulnerable beings whose suppression is natural.[833] As this chapter will discuss, human rights law's uneasy relationship with women's agency extends to playing a role in erasing it.[834] In the seminal *A, B, &C* case at the European Court of Human Rights, when assessing whether Ireland had violated *A* and *B*'s human rights, the majority relied, in part, on the fact that the women overcame national barriers to abortion access to dismiss the claimants. The women's success in extricating themselves from the unjust laws of their state meant that their state had not *really* violated their human rights and had acted proportionately. Put differently, their display of agency stripped the women of their status of rights-holders. Conditioning women's recognition as rights holders on their powerlessness, the human rights law itself could be accused of suppressing women's agency.

This chapter, the final in this dissertation, critiques human rights law from a feminist perspective. Before the doctrine is scrutinized, the chapter builds its case for recognizing abortion as an issue of gender equality. First, it invokes different strands of feminist legal scholarship that condemn anti-abortion regulation as grounded in harmful gender stereotypes[835] and contextualizes these theories by revisiting the Irish abortion story. Examining the history of Irish abortion law and the experiences of women under its rule, the chapter demonstrates that Ireland's near-total abortion ban was designed to enforce gender stereotypes related to women's roles as mothers and wives.

Second, building on feminist approaches that foreground women's experiences, the chapter analyzes the discriminatory impacts of abortion restrictions. Examining the social meaning of Ireland's abortion regime and the law's concrete impacts on women, the chapter demonstrates how the 8th rejected the autonomy of abortion-seeking women and punished them through exile and stigma. The analysis of women's experiences takes care to emphasize that generations of Irish women withstood those burdens of shame, rejection, and stigma to travel abroad for abortion or take pills at home. In this way, the Irish abortion story adds to feminist thought on abortion by conceptualizing Irish women's experiences of restrictive abortion

[833] *See infra* note xx accompanying text.
[834] *See infra* notes 1065-1068 and accompanying text.
[835] Reva B. Siegel, *Sex Equality Arguments supra* note 24, at 833-34; Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010).

regulation, not only as an injury but also as an exemplar of women's agency. Considering how generations of Irish women withstood the burdens of shame and rejection to travel abroad for abortions or take pills at home, those who suffered can also be seen as defiant and active dissenters.

Third, the chapter argues Ireland's abortion law and policy doubly suppressed women's agency by purposefully censoring women's rejection of the state's gendered dictates. By casting women who had abortions as criminals or exemplars of shame, Ireland's abortion regime did its best to push women's defiance underground.

Part 1 of this chapter presents the theory case for recognizing abortion as an issue of gender equality.

Part 2 details the main ways in which human rights law on abortion fails to identify or challenge the gendered nature of abortion restrictions. This analysis is informed by the longstanding "feminist international law critiques."[836] and a reinterpretation of the feminist challenge to international law's public/private divide.[837] Operating as a veil to keep women's experiences of human rights abuse beyond legal intervention, the chapter argues that the public/private divide manifests in abortion jurisprudence by hiding gendered roots and harms of abortion restrictions.

Part 3 levels another feminist international law critique at abortion jurisprudence: the law's reproduction of harmful stereotypes of women as inherently vulnerable and powerless. Analyzing the cases when the law does recognize women's experiences of abortion restrictions as human rights violations, the critique suggests that this recognition is dependent upon women fitting a mold of female powerlessness. [838]

Part 4 concludes the chapter by sketching how nascent jurisprudential developments indicate that human rights law is capable of scrutinizing national regulations from an anti-stereotyping perspective and of reckoning with subordinating harms of abortion restrictions.

A. Abortion law in Ireland from a feminist perspective

1. *Purpose-based equality arguments for abortion rights*

As with most issues of gender discrimination, equality arguments for abortion rights are rejected by those committed to formalistic conceptions of

[836] Of course, feminists, whether in scholarship or activism, are not uniform in perspective, and this analysis privileges certain trends among feminist approaches.
[837] See *infra* note _ and accompanying text.
[838] See *infra* note _ and accompanying text. *See also*, Jayne Huckerby, *Feminism and International Law in the Post—9/11 Era*, 9 FORDHAM INT'L L.J. 533 (2016) (demonstrating how women's political agency is denied in discourse on counter-terrorism and human rights).

equality. Their view contends that because men and women are not similarly situated in matters of reproduction, anti-abortion laws do not treat men and women different.[839] By contrast, feminist approaches to equality undercut attempts to justify discrimination against women on the basis of biological difference.[840]A starting point for many feminists arguing for abortion rights as necessary for women's equality is the straightforward argument that because women are the sole targets of abortion regulation to the exclusion of men, anti-abortion laws amount to *prima facie* or *de jure* sex and gender-based discrimination.[841]

Examining whether regulations have been shaped, at least in part, by gender stereotypes is one of the tools that feminists have used to expose the role of gender in abortion restrictions. Analyzing the history of American abortion law and politics, feminist legal scholar Reva Siegel demonstrates that abortion restrictions in the US are grounded in and foster gendered stereotypes of women as mothers.[842]Siegel illustrates that in the nineteenth century, calls to restrict abortion access were led by physicians, whose stated goal was to regulate women – women's bodies, women's decisions and women's roles in society.[843] The physicians argued that women were corporeally bound for motherhood[844] and should therefore be restricted from accessing abortion. And when the physicians' arguments converged with prominent antifeminist discourses about women's traditional familial roles, anti-abortion discourse was endowed with overlapping accounts of women's obligations as mothers—accounts that successfully supported anti-abortion campaigns.[845]

Progressing into the 20th century, Siegal demonstrates how those anti-abortion movements replaced their overt role-based claims about women's place in society with a discourse centered upon protecting the right to life of the unborn.[846] Notwithstanding the muting of the women-as-mothers dictate, Siegel contends that abortion restrictive policies remain animated by the stereotype.[847] Even if anti-abortion regulation is driven in part by a desire to

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[839] *See, e.g.,* Paula Abrams, *The Tradition of Reproduction*, 37 Ariz. L. Rev. 453, 456 (1995).
[840] *See, e.g.,* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L.J. 1281, 1308–24 (1991).
[841] *See, e.g.,* Rebecca J. Cook & Susannah Howard, *Accommodating Women's Differences Under the Women's Anti-Discrimination Convention,* 56 EMORY L.J. 1032 (2007) [hereinafter Cook, *Accommodating Women's Differences*]; Simone Cusack & Rebecca J. Cook, *Combating Discrimination on Sex and Gender, in International Protection of Human Rights: A Textbook* 205, 214–15 (Catarina Krause & Martin Scheinin eds., 2009); Sheelagh McGuinnes and Heather Widdows, *Access to basic reproductive rights: global challenges* in The Oxford Handbook of Reproductive Ethics (Leslie Francis ed. 2017); Writing from the U.S. perspective, *see*, Cass Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 29 - 44 (1992).
[842] *See, e.g.,* Reva Siegel, *Reasoning from the Body, supra* note 20, and accompanying text.
[843] *Id.* 301.
[844] *Id.* 319-321.
[845] *Id. See also*, LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING (2010). *See also* JANET FARRELL BRODIE, CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA (1994).
[846] *See, e.g.,* Reva Siegel, *Sex Equality Arguments, supra* note 24; *See also*, Neil Siegel, *supra* note 24.
[847] *Id*

safeguard "the unborn," she argues, the harms of forced motherhood—the social, physical, emotional, and economic implications of bearing and rearing a child—are so significant that the State could only force women to withstand such injuries if it considers motherhood to be the natural order of things for women[848] using an instrument of public power to compel motherhood is not merely about protecting fetal life, she says, but is also about gender scripting.

2. *The gendered roots of Ireland's abortion restrictions*

Siegel's thesis resonates across the Atlantic. As described in Chapter 1 of this dissertation, those who led the Pro-Life Amendment Campaign (PLAC) in 1983 presented the 8th amendment as a necessary legal intervention to block Irish Courts from changing recognizing a right to abortion in the Irish Constitution.[849] Because the Supreme Court in *McGee*[850] had inferred a right to contraception from a right to marital privacy (from Article 40.3.1 and Article 41.1.1)[851] PLAC asserted that the Court could potentially recognize a right to abortion in the same source. They argued that a constitutional guarantee for unborn life could prevent such judicial activism. However, the Supreme Court's jurisprudence was clear that the Court did not consider it possible to interpret the Irish Constitution as containing a right to abortion. In fact, the Supreme Court was explicit in *McGee* that the right to contraception did not extend to limiting family size by abortion.[852] Moreover, the 1861 Offenses Against the Person Act made intentional miscarriage a felony; abortion carried a life sentence of penal servitude and anyone who assisted with an abortion was guilty of a misdemeanor. Both constitutionally and legislatively, the "unborn" was safe.

The absence of a possibility that abortion could be legalized in Ireland suggests that the proponents of the 8th amendment had additional motives beyond legal protection for the "unborn." A number of scholars assert that the 8th amendment was part of an ongoing nation-building project that the State had pursued since its formation in the 1920s.[853] Having gained independence from the British Empire in 1922 to become the 'Irish Free State, Ireland sought to distinguish itself from its former colonizer.

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[848] Reva Siegel, *Reasoning from the Body, supra* note 20, 371-380.
[849] *See, e.g.,* Chapter 1, *supra* note 50-51.
[850] McGee, *supra* note 27.
[851] [1974] IR 284; Constitution of Ireland 1937 art. 40.3.1 ("The State guarantees in its laws to respect, and as far as practicable, by its law to defend and vindicate the personal rights of the citizen." Article 41.1.1 states, "The state recognizes the family as the natural, primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.").
[852] *See McGee*, *supra* note 27, (Walsh J stated that "any action on the part of either the husband and wife or of the State to limit family sizes by endangering or destroying human life must necessarily not only be an offence against the common good but also against the guaranteed personal rights of the human life in question.").
[853] For this argument, *see* Ruth Fletcher, *Post-Colonial Fragments: Representations of Abortion in Irish Law and Politics*, 28 J.L. & SOC'Y 568 (2001); Lisa Smyth, *Feminism and Abortion Politics*, 25 WOMEN'S STUD. INT'L F. 335 (2002); LISA SMYTH, ABORTION AND NATION (2005).

Unfortunately for Irish women, the burdens of this identity-building fell to them.[854] While the 1922 Free State Constitution—the State's first Constitution—guaranteed equal rights and equal opportunities to all its citizens "without distinction of sex," within a couple of years of its founding, Ireland's laws, policies, and practices entrenched the primacy of the patriarchal family as the measure of the new State.[855] Within a decade of its founding, Ireland's national policies included a ban on divorce,[856] the criminalization of the importation of contraceptives,[857] and limits on the ability of married women to participate in the public workforce.[858] No law was more glaring in its affirmation of women's familial role than Article 41.2.2 of the 1937 Constitution. Expressly asserting that the "common good" depends upon a woman's "life within the home," the State defined women's capacity to contribute to the new nation to performance of the maternal role.[859]

Evidence suggests that the enactment of the 8th amendment in 1983 was a forceful attempt to maintain this status quo and protect it from a nascent threat. In the late 1970s, the global movement for the emancipation of women finally reached Irish shores. A small group of campaigners became vocal on issues of gender inequality, demanding action on violence against women, employment discrimination, discrimination against single mothers and their children, and access to contraception.[860] The campaign for the latter received a significant boost from the 1974 Supreme Court decision in *McGee*, which recognized a constitutional right to contraception for married

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[854] Notably, the demarcation of gender roles in nation-building is not specific to Irish nationalism; this practice is common in postcolonial states. Scholars have demonstrated how observing differentiated gender roles enables formerly oppressed male subjects to assert masculinity and right to power *See* ASHIS NANDY, THE INTIMATE ENEMY: LOSS AND RECOVERY OF SELF UNDER COLONIALISM DELHI (1983).

[855] *See, e.g.,* Sandra McEvoy, *The regulation of sexuality in the Irish Free State* in MEDICINE, DISEASE AND THE STATE IN IRELAND, 1650– 1940, (Eoin Malcolm eds. 1999) at 253–266.
Additionally, it is likely that the Catholic Church was aided in its assumption of a prominent national role due to the limited capacities of the new State. Though less explored in scholarship relating to Ireland, the power vacuums that are common to emerging (and fragile) States are often filled by non-State actors; from armed groups to religious orders, non-state actors can gain significant political and social influence by providing services, finances, and even employment. For an example of this in the Syrian context, *see* Yassin al-Haj Salih, *The Syrian Shabiha and Their State*, 16 MIDDLE EAST ARTICLES, (2012), https://lb.boell.org/en/node/1355.

[856] Divorce was constitutionally prohibited until 1995. It is now permitted, subject to strict requirements. *See* Family Law Act 1995 (Act No. 26/1995), http://www.irishstatutebook.ie/1995/en/act/pub/0026/.

[857] *See McGee*, *supra* note 27 and accompanying text.

[858] Women in state employment were required to quit their positions upon marriage, and the Minister for Industry and Commerce had the power to limit the number of women employed in any industry. Conditions of Employment Act 1935, § 16, (Act No. 2/1936), http://www.irishstatutebook.ie/eli/1936/act/2/enacted/en/html. See also, Caitriona Beaumont, *Women, Citizenship and Catholicism in the Irish Free State, 1922-1948*, 6 WOMEN'S HIST. REV. 563 (1997) [hereinafter, Caitriona Beaumont, *Women, Citizenship, and Catholicism*] (describing how girls attending convent schools were taught the importance of obedience, modesty, and chastity).

[859] Article 41.2.1° states that: In particular, the State recognizes that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
Article 41.2.2° sets out that: The State shall, therefore, endeavor to ensure that mothers shall not be obliged by economic necessity to engage in labor to the neglect of their duties in the home.

[860] *See, e.g.,* Sandra McEvoy, *The Catholic Church and Fertility Control in Ireland, supra* note 67.

couples[861] and from subsequent legislative reform that enabled married couples to request contraceptives on prescription.[862] It was a modest increment in facilitating access to contraception that was nevertheless met with significant concern amongst conservative factions of Irish society.

As the Government legislated to implement *McGee* and legalize contraception for married couples in 1979, politicians suggested this move would force a deluge of social reforms on the country, including on abortion. "As soon as we have contraception, there will be abortion, divorce, euthanasia, and all the evils of venereal disease," argued Fianna Fáil's Michael F. Kitt.[863] Another deputy, Oliver J. Flanagan, alleged that some contraceptives were actually abortifacients in their method of operation and, in the same breath, suggested that Irish society now suffered from a lack of respect for authority for the State, parents, and church.[864] Outside the Dáil, conservative Catholic groups echoed Kitt and Flanagan's concern about the loosening grips on Irish traditional society. Catholic Family Life attested that "abortion cannot be divorced from contraception," while members of Parent Concern a later picketed the Well Woman Centre on Dublin's Lower Leeson Street with posters that read "Parents! Contraception means promiscuity and abortion!"[865] In a sign of things to come, the Irish Family League later distributed a leaflet advocating an amendment that would enshrine a ban on abortion in the Constitution.[866]

The following year, the PLAC formed and argued that the existing legislative criminalization of abortion was not enough of a guarantee against legal abortion in Ireland. The only way to Ireland against abortion, they claimed, was via a "pro-life" constitutional amendment that would require the State to protect the unborn.[867] It also provided an opportunity to strike back against and quash the burgeoning advocacy and action on women's liberation. Using an anti-abortion amendment to the *Constitution* as their vehicle, the PLAC succeeded in reasserting women's role as mothers in the State's basic law for a second time.[868] Indeed, those who were involved in moving the referendum forward were so successful in strengthening the notion of women as mothers that the word "mother" is used in place of "woman" in the language of the amendment:

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[861] *See McGee*, *supra* note 27.
[862] Health (Family Planning) Act 1979, (Act No. 20/1979).
[863] 274 Dáil Deb. (July 11, 1974), *Control of Importation, Sale, and Manufacture of Contraceptives Bill, 1974: Second Stag*e https://www.oireachtas.ie/en/debates/debate/dail/1974-07-11/3/.
[864] *Id.*
[865] *See, e.g.,* EMILY O'REILLY, MASTERMINDS OF THE RIGHT.
[866] *Id.*
[867] *See, e.g.,* Siobhán Mulally, *The abortion debate: re-partitioning the State* in GENDER, CULTURE AND HUMAN RIGHTS RECLAIMING UNIVERSALISM, at 142.
[868] *See, e.g.,* Paula Hanafin, *Defying the Female: The Irish Constitutional Text as Phallocentric Manifesto* 11 TEXTUAL PRACTICE 249 (1997).

> The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

Additionally, evidence from the referendum debates suggest the desire to protect "the unborn" was inconsistent. During the campaign in 1983, anti-amendment activists contested the purported interest of anti-abortion activists in protecting unborn life.[869] To be consistently "pro-life," they argued, the Pro-Life Amendment Campaign would also campaign to end legal discrimination against children born outside of marriage, who at the time were considered 'illegitimate' under Irish law and had no legal status.[870] In stark contrast, John O'Reilly, the man who first conceived of PLAC's "pro-life" amendment, argued that the amendment was necessary to tackle what he deemed to be "anti-life practices," including contraception and, notably, the rising number of children conceived out of marriage.[871] The birth of children to unmarried women could undoubtedly be considered as contravening for the Pro-Life Amendment Campaign, the desire to protect unborn life extended only to unborn life that would within exist within the patriarchal family; the beacon of Ireland's identity upon which women's conformity depended.

Analysis of abortion law and politics after 1983 illustrates that the State's approach to abortion remained animated by gender stereotypes. The X-case and the subsequent 1992 referendum established two abortion-related rights for Irish women: the right to obtain an abortion where there was real and substantial risk to a woman's life and the travel for an abortion. Some commentators considered such legal developments to be significant progress for Irish women because the State was acknowledging the potential need for

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[869] Women's Right to Choose Campaign (WRCC), 1982 as quoted in Sandra McEvoy, *supra* note xx.

[870] *See, e.g.,* Illegitimate Children (Affiliation Orders) Act, 1930 (Pub. Stat. No. 17/1930), http://www.irishstatutebook.ie/1930/en/act/pub/0017/index.html; Additionally, historical research and human rights reports establish that the State's policy on "illegitimacy" involved the incarceration of thousands of infants and children in Mother and Baby Homes and other institutions; illegal adoption, including the 'sale' of children, and high infant mortality rates; *See also*, UN DOC A/HRC/40/51(2018) Rep. of the Special Rapporteur on the Sale and Sexual Exploitation of Children on her Country Visit to Ireland, https://www.ohchr.org/EN/Issues/Children/Pages/CountryVisits.aspx.

[871] *See, e.g.,* Fintan O' Toole, *Why Ireland Became the Only Country in the World to Have a Constitutional Ban on Abortion*, IR. TIMES (August 26, 2014) http://www.irishtimes.com/news/politics/why-ireland-became-the-only-country-in-the-democratic-world-to-have-a-constitutional-ban-on-abortion-1.1907610 ("For O'Reilly "pro-life" was the opposite of "anti-life", a term which incorporated the availability of contraception and (weirdly) the rising number of babies born out of wedlock"). Recently released evidence also points to extremely high mortality rates among 'illegitimate children who were raised in so-called 'Mother and Baby Homes.' A Commission of Investigation of Mother and Baby' homes was established in 2015 following allegations about the deaths of 800 babies and the manner in which they were buried in one of the homes. See S.I. No. 57/2015—*Commission of investigation (mother and baby homes and certain related matters)* Order 2015.

abortion[872] In reality, however, the State was acting in accordance with the same gendered ideology that had dominated in 1983. The right generated by *X* allowed women to end their pregnancies if they could prove that there was a substantial risk to their lives. But the dying woman did not challenge the norm of motherhood; her abortion was "life-saving treatment."[873] and she would not want a "termination" if it were not for her tragic circumstances. The travel amendment provided an option for women to end their pregnancies but required women to leave the jurisdiction to do so. Thus, women who resisted their prescribed role as mothers were sent away, leaving the nation's patriarchal gender order intact.

Similarly, analysis of anti-abortion discourse surrounding the passage of the Protection of Life During Pregnancy Act 2013 (PLDPA) reveals the harmful gender stereotypes driving anti-abortion advocates. As described in Chapter 1, the PLDPA 2013 was the first piece of legislation to give effect to a woman's right to therapeutic abortion. The Act provided a statutory framework based on the 8th amendment and the X-case (legality of abortion if the woman's life was at risk) as required by the European Court of Human Right's judgment in *A, B & C,*[874] and was spurred into urgency following the death of Savita Halapanavar. Notwithstanding that the Act did not liberalize Irish abortion law in any way, an intense and highly polarized debate accompanied the parliamentary process. Taking issue with the proposed decriminalization of abortion in circumstances where a woman's life was at risk owing to suicide, anti-abortion advocates mobilized around two claims. Firstly, as in recent decades in the U.S., Irish anti-abortion campaigners characterized their attempts to restrict abortion as a way of 'protecting women from abortion.[875] Expressing alleged concern for women, they argued that abortion fuels depression, anxiety, and suicidal thoughts among women because women regret their decisions to end their pregnancy. Asserting that "there is nothing so devastating as guilt to the depressed mind," Lucinda Creighton, then a Government minister, claimed that abortion "may push[es] someone to contemplate suicide."[876] Deputy Billy Timmons echoed Creighton's claim, arguing that rather than protecting the right to life of the woman, by enabling abortion access, the bill would "potentially put women's

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[872] *See, e.g.,* Laury Oaks, *Abortion is Part of the Irish Experience, It Is Part of What We Are,* 25 WOMEN'S STUD. INT'L F. 315 (2002).

[873] Catholic teaching differentiates between abortion and medical treatments, which do not directly and intentionally seek to end the life of the "unborn baby." *See Statement by the Four Archbishops of Ireland in Response to the Decision Today by the Government to Legislate for Abortion* http://www.catholicbishops.ie/2012/12/18/statement-archbishopsireland-response-decision-today-government-legislate-abortion.

[874] *Id.*

[875] *See, e.g.,* Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008).

[876] *See,* 805 No. 1, Dáil Deb., Deputy Lucinda Creighton (July 1, 2013),http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013070100011?opendocument.

lives at risk."[877] Invoking Norma McCorvey, the applicant in *Roe v. Wade* who went on to join anti-abortion campaigns many years afterwards, other TDs alleged that it was axiomatic that a woman would regret ending their pregnancy.

Outside the Dáil Chambers, anti-abortion activists embraced the argument that abortion, rather than the coercive continuation of an unwanted pregnancy, posed a risk to women's lives. The Pro-Life Campaign parked a van less than 10 minutes away from the Dáil (and directly outside the doors of the Dublin Rape Crisis Centre) with a sign reading "[t]he abortion bill won't make women safer." Women Hurt – an anti-abortion group modelled upon U.S. based Catholic group 'Rachel's Vineyard' for women who believe they had been harmed by abortion — lobbied politicians and held vigils. Spreading the message that their members had experienced deep guilt and regret after terminating their pregnancies in England, they too took advantage of the space, albeit narrow, that had opened for women's voices in the abortion debate.[878]

The narrative that women who terminate pregnancies experience regret from which they must be protected was likely an import from across the Atlantic; in the U.S., the notion that women suffer "post-abortion syndrome" akin to depression and PTSD has been in play since the mid-1990s. And though there is no evidence that abortion leads to mental illness.[879], the idea that abortion hurts women has gained significant legal salience. In 2007, Supreme Court Justice Anthony Kennedy, writing the majority opinion *Gonzales v. Carhart* , upheld a federal ban on physicians from performing intact dilation and extraction of fetuses - an abortion procedure performed later in pregnancy - on the grounds that if a women was enabled to choose this procedure, it was likely that her mental health would later suffer owing to the guilt she would feel at having had such an abortion.[880] Agreeing with a friend of the court brief that relied on statements from women who claimed to regret their abortions rather than any medical evidence of mental harm associated with having an abortion,[881] the Justice concluded that "it seems unexceptionable to conclude some women come to regret their choice to

[877] *See, e.g.*, 808 No. 3, Dáil Deb., Deputy Billy Timmons (June 27, 2013), https://www.oireachtas.ie/ga/debates/debate/dail/2013-06-27/7/.

[878] *Stand For Life Vigil - Dungarvan - Bernadette Goulding* (March 5, 2013) https://www.youtube.com/watch?v=X2AxQsJK-Gw&ab_channel=JasonBrower.

[879] A review of global scientific evidence by the Academy of Medical Royal Colleges in the UK found that "the rates of mental health problems for women with an unwanted pregnancy were the same whether they had an abortion or gave birth." Academy of Medical Royal Colleges, *Induced Abortion Mental* Health (2012) https://www.aomrc.org.uk/reports-guidance/induced-abortion-mental-health-1211/.

[880] Gonzales v. Carhart 127 S.Ct. 1610 (2007).

[881] Brief of Sandra Cano at 22-24, Gonzales v. Carhart 127 S. Ct. 1610 (2007) (the Former "Mary Doe" of Doe v. Bolton, and 180 Women Injured by Abortion as Amici Curiae Supporting Petitioner.).

abort the infant life they once created and sustained. Severe depression and loss of esteem can follow."[882]

In addition to imposing a ban on dilation and extraction, the narrative that women considering abortion need protection from their own decisions underpins a number of legislative restrictions in the U.S. and beyond; compulsory waiting periods, third-party authorization, and compulsory ultrasounds all curtail women's autonomy under the guise of protecting women. As Reva Siegel and other feminist legal scholars have explained, such contentions about women's health and women's choices rely upon claims about women's nature — women are destined to be mothers and will be harmed if they don't fulfill their natural role.[883] The reasoning holds that law must restrict abortion because if a woman decides to terminate a pregnancy, she will suffer at having rejected her natural duty to care for her offspring. Pathologizing women's decisions to get abortions as "misled, coerced or abnormal"[884] anti-abortion campaigners contend that it is in a woman's own interest that the law reject her decision.

For the anti-abortion legislators who argued against the Protection of Life During Pregnancy Bill in Ireland, rather than resounding the Irish legislature's legacy of misogyny on issues affecting women, the woman-protective arguments enabled politicians to justify their anti-choice positions as born from legitimate concern for women, vulnerable women in particular. Deputy Michael Healy Rae proclaimed that many of the women who came to him to discuss their isolation, low self-esteem, and nightmares post-abortion had "not been warned about the mental effect of an abortion."[885] In the main national broadsheet, a high-profile psychiatrist queried how law could recognize the capacity of a "mother" to consent to an abortion given that such a woman would be "emotionally overwhelmed to the extent that her judgment is impaired."[886]

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[882] Gonzales v. Carhart, 127 S. Ct. at 1634.

[883] *See, e.g.,* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1696 (2008); Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008) [hereinafter, Reva Siegel, *The Right's Reasons*]; Chris Guthrie, *Carhart, Constitutional Rights, and the Psychology of Regret*, 81 CAL. L. REV. 877, 882 (2008). Historian Karissa Haugeberg has shown how the argument that abortion hurts women date to the 1960s and the early years of the abortion reform movement. This line of advocacy, however, existed primarily amongst workers in crisis pregnancy centers set up by Catholic women to persuade women in their communities not to end their pregnancies. The argument gained prominence following the supreme court decision to uphold the right to abortion in Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992). The wider anti-abortion movement adjusted their advocacy accordingly to argue that what women really needed was to be protected from abortion, KARISSA HAUGEBERG, WOMEN AGAINST ABORTION: INSIDE THE LARGEST MORAL REFORM MOVEMENT OF THE TWENTIETH CENTURY (WOMEN, GENDER, AND SEXUALITY IN AMERICAN HISTORY) (2017).

[884] Reva Siegel, *The Right's Reasons*, *id.*, at 1687.

[885] *See, e.g.,* 808 No. 2 Dáil Deb., Deputy Michael Healy Rae, Parliamentary Debates, (June 26, 2013) http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013062600009?opendocument#G01900.

[886] Enda Hayden, *Threat of suicide cannot be basis for abortion law,* IRISH TIMES (May 6, 2013) https://www.irishtimes.com/news/health/threat-of-suicide-cannot-be-basis-for-abortion-law-1.1318249.

The second argument against the PLDPA warned that the legislation would "open the floodgates" to "abortion on demand."[887] In contrast to the depiction of the vulnerable woman needed to be rescued, the abortion-seeking woman was now perceived as deviant and deceitful. The Act's opponents claimed that having a suicidality exception to the abortion ban was a slippery slope because abortion-seeking women could lie about being suicidal and manipulate health practitioners into approving their abortion. In the Dáil, Deputy Denis Naughton asserted that "if a woman states that she is suicidal, a doctor has no option but to believe her. There is no way to disprove the claim."[888] In other words, if abortion was legalized in cases of risk to life owing to suicide, the law would leave doctors in a situation where they would *have* to trust women, and even worse, abortion-seeking women. To avoid this scenario, anti-abortion advocates argued, the law must exclude suicidality from the legitimate grounds for abortion in the first place.

Though the anti-abortion campaigners failed in their efforts to prevent the PLDPA from passing, the narratives about the dishonesty and irrationality of abortion-seeking women pervaded the legislation, particularly the procedural process to access abortion in situations of suicidality. In such cases, the law created an obstacle course whereby a woman was required to demonstrate to three medical practitioners that there was a 'real and substantial risk' to her life.[889] If she failed to obtain a joint certification from all three medical practitioners, the decision had to be reviewed by a further three practitioners.[890] Suggesting that without being certified by at least three medical practitioners, a woman would lie about having suicidal thoughts, the law depicted and treated abortion-seeking women as unworthy of trust.

3. *Effects-based equality arguments for abortion rights*

In addition to the feminist technique of examining whether abortion restrictions are grounded in stereotypical notions of women, to support the theory that abortion restrictions amount to gender-based discrimination,

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[887] 808 No. 2 Dáil Deb.,Joe McHugh TD, (June 26, 2013), http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013062600046#TT00200 ("the precedent in California, in France and in the United Kingdom is alarming. The figures are alarming. People are genuinely concerned that if this legislation is introduced, the floodgates will open."); *See also*, Fiona de Londras & Laura Graham, *Impossible Floodgates and Unworkable Analogies in the Irish Abortion Debat*e, 3 IRISH J. LEGAL STUD. 54, 61-62 (2013); Clare Murray, *The Protection of Life During Pregnancy Act 2013: Suicide, Dignity and the Irish Discourse on Abortion,* 25(6) SOC. & LEGAL STUD. 677 (2016).

[888] *See, e.g.,* 808 No. 3 Dáil Deb., Deputy Denis Naughten, (June 27, 2013), https://www.oireachtas.ie/ga/debates/debate/dail/2013-06-27/7/.

[889] PLDPA, (Act No. 35/2013) at § 9 (1)(a)(ii). *See also* Veronica O' Keane, *Ireland's Abortion Law Turns Healthcare into Obstacle Course*, AMNESTY IRELAND https://www.amnesty.org/en/latest/campaigns/2016/01/irelands-abortion-lawturns- healthcare-into-obstacle-course/.

[890] PLDPA, (Act No. 35/2013) § 10. Notably, in the first year of the act, medical teams sanctioned just three abortions owing to risk of suicide; *See* GOV'T OF IR., REP. ON THE PROTECTION OF LIFE DURING PREGNANCY (2014), http://health.gov.ie/wp-content/uploads/2015/06/annual-report-2014-Protection-of-Life-During-Pregnancy1.pdf.

feminists scrutinize the effects of abortion restrictions on women. Asserting that no aspect of male-only healthcare is restricted by law is one basis on which feminist scholars, particularly those writing from an international law perspective, impugn abortion restrictions as discriminatory.[891] Another iteration of this differential treatment argument is that law does not require men to sacrifice their bodily autonomy for "the use and control by others," whereas abortion bans can compel women to continue unwanted pregnancies and give birth.[892]

Other argues that denying a woman's right to choose is an equality issue because laws that reject women's autonomy impair women as a class. Though advocating for autonomy presupposes the protection of individual decisions, [893] the social consequences of invalidating women's reproductive decision-making are significant.[894] Communicating that women are not valued as moral agents in the State, anti-abortion laws devalue women, as a group, in society.

Often, this latter critique of the limits anti-abortion laws place on women's autonomy is translated as an issue of privacy rather than equality. This is due, in large part, to the fact that in *Roe*, the U.S. Supreme Court held that the constitutional right of privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[895] However, *Roe* also prompted a greater understanding of abortion as an equality issue – albeit outside the Court. Because the Court in *Roe* essentially shared a woman's abortion decision with the abortion provider,[896] feminists rallied to retake the

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[891] Rebecca Cook, *Accommodating Women's Differences, supra* note x at 1039. This was one of the principal equality arguments used by the Irish abortion rights movement; access to sexual and reproductive healthcare for men incurred no criminal punishment as compared to abortion access for women; *See*, FIONA DE LONDRAS & MAIREAD ENRIGHT, REPEALING THE 8th (2018); Trade Union Campaign to Repeal the 8th Amendment, Model Trade Union Motion, https://uniteyouthdublin.files.wordpress.com/2014/09/tu4repeal-leaflet.pdf; 784 No. 2, Dáil Deb., Alan Shatter (November 27, 2012), http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/WebAttachments.nsf/(\$vLookupByConstructedKey)/dail~20121127/\$File/Daily%20Book%20Unrevised.pdfopenelement (arguing that there is no impediment to men seeking and obtaining any required medical intervention to protect not only their lives but also their health and quality of life).

[892] *See, e.g.,* Judith Jarvis Thompson, *A Defense of Abortion*, *supra* note 19; EILEEN L. MCDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT (1996); Arunima Sarkar, *Articulating Various Facets of Female Reproductive Laws: Issues and Challenges*, 2 INDIAN J. OF LEGAL PHIL. 168, 174 (2014) (describing abortion rights as freedom from the "servitude" of bearing an unwanted child).

[893] Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (explaining how liberal legal theory's focus on individualism and autonomy reflects a male perspective); *See also* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1016-28 (1984); See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 1353 (1988).

[894] *See, e.g.,* Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 INT'L J. L. POLY & FAM. 305, 313 (2004); Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 417–18 (2009) [hereinafter Sanger, *Decisional Dignity*] Joanna L. Grossman, *Pregnancy, Work and the Promise of Equal Citizenship*, 98 GEO. L. REV. 567, 613-14 (2010).

[895] Roe v. Wade, 410 U.S. 125, 153 (1973).

[896] *See, e.g.,* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 995, 1020 (1984) (arguing that Roe gives doctors undue power over abortion decisions); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199-200 (1992) ("The idea of the woman in control of her destiny and her place in society was less prominent in the Roe decision itself, which coupled with the rights of the pregnant woman the free exercise of her physician's medical judgment).

"right to choose" for women.[897] Recognizing that decisions about abortion can implicate a broad range of decisions that are critical to a woman's freedom—decisions about education, career, family, relationships, and health — feminists, scholars, and judges asserted that respecting a woman's decision about whether to bear a child is fundamental to women's socio-political equality.[898] Now embedded within larger feminist campaigns, protection for women's decisional autonomy in the abortion context was championed as a matter of gender equality.[899]

Articulating the toll that motherhood takes on women's right to participate and flourish in the marketplace and public sphere is another way that feminists have uncovered the subordinating harms of abortion denial.[900] Though women's participation in the workplace has risen dramatically in the past 50 years, long-standing gender stereotypes related to family and work result in women assuming the bulk of child-care and domestic responsibilities. Such responsibilities create time deficits for women that can inhibit their participation and progress in the paid labor force, education, and politics. In the U.S., for example, more than half of women who are prime age for work (25- to 54-year-olds) who are outside the labor force list caregiving as their reason for nonparticipation.[901] And the trend extends worldwide; women and girls commit substantially more time than men to unpaid care work, which undermines the possibility of economic, political, and social equality between the genders and entrenches women's disproportionate vulnerability to poverty across their lifetime.[902] Diana Foster Green's landmark 'Turnaway

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[897] For an analysis of the "right to choose" slogan in the American women's movement, *see* ROSALIND POLLACK PETCHESKY, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM (1990) [hereinafter, Petchesky, *Abortion and Woman's Choice*]; For early scholarship that articulated decision making autonomy as an aspect of equality, *see* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1308 (1991); Reva B. Siegel, *Reasoning from the Body, supra* note 20.

[898] *See* Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) (legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."). Feminist scholars may also have been motivated to counter the narrative that the 'right to choose' was a right for selfish mothers to pursue their own self-interest as contended by some, including anti-abortion activities. For example, prominent feminist scholars Joan Williams, Ruth Colker, and Majorie Schultz critiqued the right to autonomy as a basis for women's abortion rights for being excessively individualistic and engendering rhetoric about selfish mothers and unnurtured children. *See* Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice,* 66 N.Y.U. L. Rev. 1559, 1584 (1991); Joan Williams, *Mothers' Dreams: Abortion and the High Price of Motherhood,* U. PA. J. CONST. L. 818 (2004)*;* Robin West, *Forward: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 79 - 85 (1990); Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 CAL. L. REV. 1011 (1989); Majorie Schultz (arguing that autonomy rhetoric and exclusively "women-regarding positions" undermine pro-choice arguments because it presents abortion decisions as about a woman's self-interest alone).

[899] *See* Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) (legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.").

[900] *Id.*

[901] *See, e.g.,* Audrey Breitwieser, et al, *The recent rebound in prime-age labor force participation*, BROOKINGS (August 2, 2018), https://www.brookings.edu/blog/up-front/2018/08/02/the-recent-rebound-in-prime-age-labor-force-participation/.

[902] *See, e.g.*, DEBBIE BUDLENDER, TIME USE STUDIES AND UNPAID CARE WORK (2010); Claire C. Miller, *Children Hurt Women's Earnings, but Not Men's*, N.Y. TIMES (February 5, 2018), https://www.nytimes.com/2018/02/05/upshot/even-in-family-friendly-scandinavia-mothers-are-paid-less.html;

study' on the outcomes of women who received the abortions they sought and those who were compelled to carry their unwanted pregnancy to term, provides recent empirical evidence of the economic costs incurred by women when their reproductive autonomy is rejected; Foster Green's study finds that women who were 'turned away' and denied abortion have higher odds of poverty six months after denial than women who received abortions. Additionally, women who are denied abortions are more likely to be in poverty for four years subsequent to being denied an abortion.[903]

Escalating this critique, feminists demonstrate how such harms disempower women as a class: by foreclosing opportunities for women to gain power in social, political, and economic life, abortion restrictions limit the ability of women, in the aggregate, to compete with men for power.[904] In turn, the practice of gender — the construction of social differences, namely power inequalities, between men and women—is reproduced.[905] Moreover, as intersectionality theory recognizes that gender is only one potential axis of discrimination and that discrimination against women is often combined with and compounded by oppression based on race, class, sexuality, and ethnicity.[906] For women who are marginalized in society— women with minority racial, ethnic, or religious identities, women with low incomes, migrant women—the gendered impacts of abortion denial are compounded by economic, racial, religious, caste, citizenship status, and other social inequities.[907] As the founders of the reproductive justice movement have laid bare, for women of color, control over their lives and bodies is challenged not only by gender but by systemic poverty and racism.[908] Human rights advocates document the racial and socioeconomic disparities that plague access to reproductive rights, even where abortion and other reproductive health services are legal.[909] As such, the denial of abortion rights can entrench

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See also, Hum. Rts. Council, Rep. of the Working Group on Discrimination against Women in Law and Practice, HRC/A/68/293, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/422/71/PDF/N1342271.pdf?OpenElement.

[903] DIANA FOSTER GREEN, THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION (2019).

[904] *See, e.g.,* Reva Siegel, *Equality and Choice: Sex Equality Perspectives on Reproductive Rights in the Work of Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 63 (2013); Reva Siegel, in WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION 103 (Jack. M. Balkin ed., 2005).

[905] *See, e.g.,* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 184 (1989) ("In women's experience, sexuality and reproduction are inseparable from each other and from gender.").

[906] *See generally*, Kimberly Crenshaw et al, *Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis* (2013) 38 SIGNS 785.

[907] For the compounded harms on native women in the USA, *see* Alan J. Shelfer, *Indigent Women and Abortion: Limitation of the Right of Privacy in Maher v.* Roe 13 (2) TULSA L. J. 287 (1977). A discussion of the heightened barriers that women endure in accessing reproductive freedom can be found in DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY (1997).

[908] Loretta J. Ross et al., *Just Choices: Women of Color, Reproductive Health, and Human Rights*, in POLICING THE NATIONAL BODY: SEX, RACE, AND CRIMINALIZATION 147 (Jael Silliman & Anannya Bhattacharjee eds., 2002); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1411 (2009).

[909] *See*, e.g., Centre for Reproductive Rights & National Latina Institute for Reproductive Health, *Nuestra Voz, Nuestra Salud, Nuestro Texas: The Fight for Women's Reproductive Health in the Rio Grande Valley* (2013)

social and economic inequalities for marginalized women in addition to inscribing power inequalities based on gender.

4. *The gendered harms of Ireland's abortion law*

The impacts of Ireland's legal abortion ban fueled gender subordination, albeit through different means than those just described. The majority of Irish abortion-seeking women went to the United Kingdom and other European countries to end unwanted pregnancies, and in the decade before the ban was overturned, a substantial number of women ended pregnancies with abortion medications at home.[910] These women did not suffer the inequalities of forced motherhood censured by feminist legal scholars and pro-choice advocates. The law had a different vice: when women asserted moral authority over their lives and choose abortion, they were either exiled from the State or criminalized. For rejecting the State's normative ideas about gender, women were punished through expulsion, rejection, and significant burdens of stigma.

At the outset, it should be acknowledged that a significant number of Irish women were, in fact, subjected to harms of forced pregnancy and childrearing by the 8th amendment; abortion travel is beset by social inequality. For unemployed women or women earning low wages, the freedom to travel was often illusory. Traveling to England for an abortion cost between €2,000 and €3,500 on average.[911] Some women were forced to obtain loans from illegal money lenders to fund their abortions; others reported temporarily entering prostitution to raise the necessary finances.[912] Additionally, for asylum-seeking women, the constitutional freedom to travel did not apply. To leave the country, asylum seekers must apply to the Irish Department of Justice for a temporary travel document and a re-entry visa to return to Ireland, a process that is complicated, costly, and sometimes arbitrary. And as in all jurisdictions that restrict abortion, the subordinating harms of forced pregnancy and motherhood in Ireland were compounded by discrimination based on class and ethnicity.[913]

Nonetheless, every year, at least 4,000 Irish women crossed borders to exercise their right to choose, and another approx.1,000 women ordered

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http://nuestrotexas.org/pdf/NT-spread.pdf. (campaign to highlight the discriminatory policies that impede immigrant women's access to reproductive health care); Brief for National Latina Institute for Reproductive Health et al. as Amici Curiae Supporting Petitioners, Whole Woman's Health, 136 S. Ct. 2292 (2016) (No. 15-274.)

[910] *See, e.g.,* Chapter 1.

[911] Christine Zampas, *She is Not a Criminal*, *supra* note 11.

[912] As reported in Citizens' Assembly, *First report and recommendations of the Citizens' Assembly: The Eighth Amendment of the Constitution* https://ptfs-oireachtas.s3.amazonaws.com/DriveH/AWData/Library3/CAdoclaid290617A_110031.pdf .

[913] *See, e.g.,* Abortion Rights Campaign, *Submission to the Citizens Assembly* (2017) www.abortionrightscampaign.ie.

abortion pills to take illegally at home.[914] These women escaped coerced birth and parenting. But as subjects who challenged the dominant gender order, they were punished.

Feminist human rights law scholars and practitioners have explored how the criminalization of abortion.[915] and other restrictions on access[916] generate intense stigma about abortion-seeking women and abortion itself. By presenting abortion as wrong and deserving of severe punishment, abortion and abortion-seeking women are stigmatized as immoral and deviant by anti-abortion laws. The impacts include imposing burdens of shame, secrecy, and exclusion.[917] As an "attribute that is deeply discrediting," stigma is capable of spoiling or tainting one's identity and discounting them in society.[918] Marked as "others," those who are stigmatized may become subject to boundaries or barriers to the communities to which they would otherwise belong.[919] Moreover, from a policy perspective, the stigmatization cycle is reinforcing; when stigma perpetuates the notion that abortion is an immoral practice, this can reinforce the continued criminalization or restriction of the practice.[920]

In the Irish context, the burdens of abortion stigma on abortion seeking-women manifested in two main ways. Firstly, many women felt compelled to conceal their abortions.[921] Even though women who traveled had done nothing illegal, women reported feeling "like criminals" over the course of their journey and upon return, such that they hid their experiences.[922] Not only did very few women publicly discuss their abortion journeys—few disclosed their abortion histories to anyone beyond a select band of confidantes; in 2012, Ireland's Crisis Pregnancy Program reported that "approximately 1 in 4 women experiencing a crisis pregnancy that ended in

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[914] Evidence indicates that a significant number of women and girls, who may not have been able to travel, illegally took the abortion pill in Ireland in a clandestine manner in Ireland. *See* Aiken, *Online Telemedicine, supra* note 6.

[915] *See, e.g.,* Rebecca J. Cook, *Stigmatized Meanings of Criminal Abortion Law in* ABORTION LAW IN TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES 346 (Rebecca J. Cook, Joanna N. Erdman, & Bernard M. Dickens eds., 2014).

[916] Anu Kumar & Leila Hessini, *Conceptualizing Abortion Stigma* 11(6) CULTURE, HEALTH & SEXUALITY 625 (2009); Anne Norris, et al. *Abortion stigma: a reconceptualization of constituents, causes, and consequences* 21(3) WOMEN'S HEALTH ISSUES 49, 54 (2011).

[917] *Id.*

[918] *See, e.g.,* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 3 (1963).

[919] Brian Link et al. *Conceptualizing Stigma* 27 ANNU REV SOCIAL. 63, 65 (2001).

[920] *See, e.g.,* Anand Grover (Special Rapporteur of the Human Rights Council on Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health), *Interim Rep.* 11 ¶ 35 (2011), *transmitted by Note of the Secretary-General*, U.N. DOC. A/66/254 (August 3, 2011) (http://www.acpd.ca/wp-content/uploads/2012/08/SR-Right-to-Health-Criminalization-of-SRHR-2011.pdf. (The stigma caused by restrictive abortion laws induces a 'chilling' climate of fear and shame that impacts on both those who seek abortions services and those who carry out the procedure.); Courtney Megan Cahill, *Abortion and Disgust*, 48 HARV. C.R.-C.L. L. REV. 410 (2013) (commenting on the role of abortion disgust in lawmaking on abortion in the USA).

[921] *See, e.g.,* Zampus, *She is Not a Criminal*, *supra* note 11 at 86; Irish Family Planning Association, *Briefing on Abortion Stigma 2014,* https://www.ifpa.ie/sites/default/files/abortion_stigma_pack_jan_2014_final.pdf.

[922] *Id.*

abortion did not tell their sexual partner."[923] For those who traveled, upon return to Ireland, many women lied to medical practitioners back in Ireland about their abortion histories for fear of the censure such a revelation might provoke. Women reported feeling isolated from their usual communities of support:

> You don't talk about it. You can't even tell your amazing mother or your amazing family. This landscape of silence and stigma has distanced me from my family, and I am not ok with that.[924]

> [I]t's an awful feeling, knowing that the only help you can receive is across an ocean. How alone do you think I felt? The pain and humiliation is something I still carry with me.[925]

In the second instance, it is submitted that the law operated to produce a class of devalued persons. By being forced to travel for abortions or have an abortion at home in fear of criminalization, the State rejected women for acting as moral agents. In addition to the acute burdens of indignity and stigma experienced by individual women, such devaluation of women's autonomy impaired the status of women in the country.[926] Socially, abortion-seeking women were branded as outsiders. Though different in many important ways, parallels can also be drawn between the law's banishing of abortion-seeking women and the State's treatment of unmarried mothers in the 20th century. From 1922 to 1996, over 10,000 women and girls—predominantly unmarried mothers, the daughters of unmarried mothers, and pregnant, unmarried women—were sent by their families, the Church, and the State to institutions known as Magdalene Laundries or Mother and Baby Homes.[927] In Magdalene Laundries, women were segregated from society,

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[923] Crisis Pregnancy Programme, *Report No. 24, Irish Contraception and Crisis Pregnancy Study* (2012) 105. For more on the stigmatizing impact of criminal abortion laws, *see* Paula Abrams, *Abortion Stigma: The Legacy of Casey*, 35 WOMEN'S RTS. L. REP. 299, 319 (2014); A Hessani Kumar, *Conceptualising Abortion Stigma Culture*, 11 (6) HEALTH & SEXUALITY 625 (2009); Maeve Taylor, *Abortion Stigma: a health service provider's perspective, in* THE ABORTION PAPERS IRELAND 217, (Aideen Quility ed., 2016); Kristen M. Shellenberg, *Social Stigma and Disclosure about Induced Abortion: Results from an Exploratory Study*, 6 (1) GLOBAL PUBLIC HEALTH (2011); Eileen V. Fegan. *'Subjects ' of Regulation/Resistance? Postmodern Feminism and Agency in Abortion- Decision-Making*, 7 FEM. L. STUD. 241; Joanna Erdman, *The law of stigma, travel, and the abortion-free island* 33 (1) COL. J. GENDER & L. 29 (2016).

[924] Susan Cahill, *My abortion was not remotely traumatic ... I have no regrets*, IRISH TIMES (February 21, 2016) https://www.irishtimes.com/life-and-style/people/susan-cahill-my-abortion-was-not-remotely-traumatic-i-have-no-regrets-1.2542740.

[925] Submissions to the Citizen's assembly, https://www.citizensassembly.ie/en/Submissions/Eighth-Amendment-of-the-Constitution/.

[926] *See, e.g.,* Eithne Luibhéid, *Sexual Regimes, and Migration Controls: Reproducing the Irish Nation-State in Transnational Contexts*, 83 FEMINIST REV. 60 (2006).

[927] *See, e.g.,* GOV'T OF IR., INTER-DEPARTMENTAL COMMITTEE TO ESTABLISH THE FACTS OF STATE INVOLVEMENT WITH THE MAGDALENE LAUNDRIES (2013),

deprived of their liberty, and forced to work without pay.[928] In Mother-and-Baby Homes, women who had become pregnant out of wedlock were hidden from the public before they gave birth, after which their babies were adopted - often illegally.[929] Though run by religious orders, these institutions were supported financially by the State.[930] The State had an interest in hiding the women whose alleged sexual immorality transgressed the country's patriarchal order; sexual activity out of wedlock—and the illegitimate child as evidence of such—contravened the primary role of women of marriage and motherhood.[931] And while being forced to travel for an abortion is very different to incarceration in state institutions, in both cases, women who deviated from gendered expectations were forced out of sight.

On the other hand, what is often overlooked in accounts of women's experiences of inequality, including in the abortion context, is that women exercise resistance in significant ways. As well as being victimized, women actively dissent. Women who were denied abortions by Ireland's laws were injured, but many took action to determine their own lives. Under the weight of a legal regime that sought to control them, and in the face of significant burdens of stigma, Irish women developed radical practices of resistance. Secretly and subversively, Irish women overcame the burdens of travel and criminalization in their thousands every single year. Or they self-sourced and self-administered their own abortions at home and helped other women to do the same.[932] Women shared information and resources, used networks of friends, diaspora, and strangers,[933] to both travel abroad and to obtain medication abortion at home.[934] And even before travel and telemedicine were the dominant means for Irish women to have abortions, evidence suggests that significant numbers of Irish women took pills, potions, or purgatives to induce miscarriage and control their fertility.[935] Women took risks to fulfill their reproductive decisions, and most women felt high levels of conviction in the choice they made and the action they took.

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http://www.justice.ie/en/JELR/Pages/MagdalenRpt2013 [hereinafter Magdalenes Report] (confirming that more than a quarter of the women held in the laundries were sent directly by the State).

[928] *Id.*

[929] *See, e.g.,* Maeve O'Rourke, et al., *CLANN: Ireland's Unmarried Mothers and their Children: Gathering the Data: Principal Submission to the Commission of Investigation into Mother and Baby Homes* (October 15, 2018) http://clannproject.org/; *see also*, Padraic Halpin, *UN rights body criticizes Ireland on abortion, church homes*, REUTERS, (July 24, 2014), https://www.reuters.com/article/us-un-ireland/u-n-rights-body-criticizes-ireland-on-abortion-church-homes-idUSKBN0FT1EX20140724.

[930] *See, e.g.,* Magdalenes Report, *supra,* note 952 (confirming that more than a quarter of the women held in the laundries were sent directly by the State).

[931] *See, e.g.,* Caroline Fischer, *Gender, nation, and the politics of shame: Magdalen laundries and the institutionalization of feminine transgression in modern Ireland* 41(4), SIGNS: J. OF WOMEN IN CULTURE AND SOC'Y 821, 843 (2009).

[932] *See also,* Cara Delay, *Pills, Potions, and Purgatives: Women and Illegal Abortion Methods in Ireland*, 1900-1950 (draft on file with author).

[933] Interview with Mara Clarke, Abortion Support Network, Irish Times Women's Podcast.

[934] LORETTA ROSS, REPRODUCTIVE JUSTICE: AN INTRODUCTION (2017), 11; *See also*, Cara Delay, *Pills, Potions, and Purgatives: Women and Illegal Abortion Methods in Ireland*, 1900-1950 (draft on file with author).

[935] Cara Delay, *From the Backstreet to Britain: Women and Abortion Travel in Modern Ireland*, Forthcoming in TRAVELLIN' MAMA: MOTHERS, MOTHERING, AND TRAVEL, (Charlotte Beyer et al eds., 2018).

Through a practice of both self-direction[936] and solidarity with other Irish women asserted their agency, even though the Irish State denied this autonomy by attempting to make it invisible. Abortion exile, illegality, and the climate of fear and stigma they engendered drove women to conceal the actions they took to in resistance to the State. Women were required to "cover"[937] their defiance of the State's gendered ideology and their active resistance of gender dictates was forced underground.

In revisiting the Irish abortion story from a feminist perspective, this section has uncovered the gendered nature of the laws that denied women's abortion rights in Ireland. The 8th amendment systematically rejected women's agency and attempted to institutionalize gender roles that subordinate women to men. The movement for abortion rights in Ireland (documented in Chapters 1 and 2 of this dissertation) struggled in order to upend this system of gender inequality. In seeking abortion rights in Ireland, women demanded that their State affirm their life choices and divest itself of laws that claimed authority over women's decisions.

As illustrated in Chapter 2, embracing human rights law as a strategy offered vital resources to advance the abortion rights' movement at different junctures in the road to repeal. But when it came to undoing the legacy of the 8th amendment and legislating for reform, international legal standards on abortion could not accommodate the affirmative recognition of women's moral autonomy that the movement sought. As currently applied, international human rights law recognizes as rights-holders only the subset of women who seek abortions because their life and health is at risk; or because they have been raped, or because their pregnancies have a fatal fetal abnormality. Women who seek abortion rights on the basis of their choices rather than on the grounds of tragedy are excluded from the law's protection.

The next section investigates this shortcoming in human rights protection and identifies a deeper problem with the law's jurisprudence. Drawing on feminist international law critiques of human rights law and the feminist analysis of abortion in Ireland just outlined, the second half of this chapter examines how the relative invisibility of gender analysis limits recognition of abortion rights and obscures the root cause of abortion rights violations.

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[936] The term 'self-direction' is borrowed from Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 829 (1998) (describing self-direction as the direction of one's own course, including the identification of particular goals and the implementation of particular projects and life plans).

[937] *See, e.g.,* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON AMERICAN CIVIL RIGHTS (2007) (describing "the demand to 'cover' . . . is the symbolic heartland of inequality—what reassures one group of its superiority to another").

B. International law on abortion from a feminist perspective

1. *International law's public/private divide*

The international legal system for the protection of human rights emerged at a particular historical moment, namely, the aftermath of the atrocities of the Second World War.[938] Over the course of almost two decades in the middle of the last century, States debated and eventually adopted the two seminal UN Human Rights Covenants: the United Nations Covenant on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (CESCR). Though these two Covenants both expressly recognize "equal rights of men and women,"[939], from a women's rights perspective, the texts are almost more remarkable for what they do not say about women. Absent from the Covenants, for example, are protections from myriad harms that markedly impact and often determine women's lives; inequities such as unpaid domestic work, forced pregnancy, or intimate partner violence are missing from the normative standards. In the early '90s, feminist international law scholars launched a robust critique of international human rights law's failure to adequately account for women's human rights. Dominant amongst their concerns was the claim that international human rights law reproduces the "public/private divide" of the liberal state.[940] This refers to the long-standing feminist theory that the liberal state structurally privileges men and masculinity over women and femininity by dividing the world into public and private spheres; in accordance with this division, the state applies liberal principles of rights and justice in the 'public' sphere but excludes the 'private' sphere — that of the home, the family and the community—from intervention.[941] The problem from a feminist perspective is that both historically and empirically, women's lives are more likely to be relegated to

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[938] From 1948 until the late 1960s, the United Nations finalized and adopted the two main UN human rights covenants: the United Nations Covenant on Civil and Political Rights (CCPR) and Economic, Social, and Cultural Rights (CESCR) Covenants. Regional organizations during this period similarly drafted agreements listing internationally guaranteed human rights. For more on the development of the modern architecture for the international legal protection of human rights, *see* PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS (2003) and SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010).

[939] Art. 3, ICCPR; Art 2, ICESCR.

[940] The leading, early feminist international law critique of the public/private divide in international law is found in Charlesworth, Chinkin, and Wright's seminal 1991 article, *Feminist Approaches to International Law,* Hilary Charlesworth, Christine Chinkin & Shelley Wright*, Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991); *See also,* Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 383 (1999); Karen Engle, I*nternational Human Rights and Feminism: When Discourses Meet*, 13 MICH. J. INT'L L. 517 (1992); Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87, 100 (1993); Donna Sullivan, *The Public/Private Distinction in International Human Rights Law,* in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 126 (Julie Peters & Andrea Wolper eds., 1995); Christine Chinkin , *A critique of the Private/Public Divide*, 10 (2) EJIL, 387, 388 (1999).

[941] As described in CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1989). *See also* Carol Pateman*, Feminist Critiques of the Public/Private Dichotomy*, in PUBLIC AND PRIVATE IN SOCIAL LIFE 281, 281 (Stanley I. Benn & Gerald F. Gaus eds., 1983).

the private sphere, the realm from which rights and justice are excluded.[942] Moreover, feminists maintain that by demarcating the private as a sphere of non-intervention, the state allows pre-existing power relations to go unchallenged in the private; and that these power relations have historically favored men.[943] In this way, feminists indict the public/private divide as a sinister tool that the state uses to both perpetuate and hide structures that sustain male dominance.[944]

In arguing that international human rights law reproduces the public-private dichotomy, feminist international law scholars identified different features of the human rights system that operate to exclude, marginalize and diminish women's interests. International human rights law's traditional design as means of protecting citizens against the totalitarianism of States was one such feature.[945] For women's human rights protection, the state-centric structure left a significant gap because 'non-state' or 'private' actors, such as family members or private organizations such as religious groups, are often the perpetrators of the abuses women suffer.[946] Feminists emphasized that in spite of profuse evidence that women worldwide suffered at the hands of their husbands, relations, and communities, international law disregarded this suffering and focused instead on violence carried out by the state (usually against men).[947] The contrast between the law's ambivalence to women's pain at the hands of private actors and its interventionist response when men are victims of non-state violence (e.g., slavery, racial discrimination, and acts of genocide) was further evidence that the public/private divide was a tool to sidestep women's suffering.[948] As in the liberal state, this policy of non-

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[942] *See, e.g.*, Frances Olsen, *The Sex of Law,* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 691, 692 (3d ed., 1998).

[943] As described by Nicola Lacey, *Theory into Practice? Pornography and the Public/Private Dichotomy*, 20 J. OF L. AND SOC'Y 93, 97 (1993).

[944] CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) 117 ("the liberal state coercively and authoritatively constitutes the social order in the interests of men as a gender—through its legitimating norms, forms, relation to society, and substantive policies").

[945] *See, e.g.,* Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. DOC. A/56/10 (2001); *See also*, Christine Chinkin, *A Critique of the Private/Public Divide,* 10 EJIL, No. 2, 387 388 (1999); Catherine MacKinnon, *Theory is not a Luxury*, in RECONCEIVING REALITY, 90.

[946] Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49, 67 (1993); Charlotte Bunch, *Transforming Human Rights from a Feminist Perspective in* WOMEN'S RIGHTS, HUMAN RIGHTS, at 11 (discussing widespread violence against women); Julie Mertus, *State Discriminatory Family Law and Customary Abuses in* WOMEN'S RIGHTS, HUMAN RIGHTS, 135, 137, 140 (Julie Peters and Anne Wolper eds. 2005) (discussing the role of global family law in perpetuating domestic abuse); Rebecca Cook, *International Human Rights and Women's Reproductive Health in* WOMEN'S RIGHTS, HUMAN RIGHTS, 256- 260 (Julie Peters and Anne Wolper eds. 2005).

[947] Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture,* in HUMAN RIGHTS OF WOMEN, 116 (Rebecca Cook ed., 1994); Catharine Mackinnon, *Are Women Human?* in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW, 3 (Dorinda G. Dallmeyer ed., 1993).

[948] *See, e.g.*, Catharine Mackinnon, *Are Women Human? in* RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 3 (Dorinda G. Dallmeyer ed., 1993) (questioning why the international community was able to immediately adapt international law to ignore the public-private divide when "on September 11th, nonstate actors committed violence against mostly nonstate (non-governmental and civilian) actors," but had failed to act to counter the violence being continuously committed by the same organization against women within the borders of

intervention in the private sphere legitimates existing power relations, which inevitably favor men.

Though international human rights law has since evolved to condemn the state for many harms perpetrated by non-state actors, including harms against women such as domestic violence[949] sexual harassment,[950] and trafficking[951] according to the feminist international law critique, the public/private divide remains salient in myriad ways. Feminist scholars caution that violations perpetrated by so-called 'non-state actors against women are still not taken as seriously as State infringements on the rights of men; blame is still laid at the hands of individuals rather than patriarchal gender structures and values that entrench women' inequality.[952]

Moreover, the dichotomy's persistence can be detected among the issues that international human rights law accepts as 'internal' to states and therefore beyond international law's reach.[953] Scholars and activists alike contend that governments are less likely to be held accountable to their international human rights commitments in situations where violations impact so-called 'cultural,' 'traditional' or 'religious' affairs in a State.[954] Usually justified as a means of respecting differences between cultures vis-à-vis the universalistic strategy of the international human rights framework, both States and scholars alike have argued in favor of relativism that permits deviance from international norms on ethical, moral, and cultural issues since the inception of the international framework.[955] Feminist scholars underline that it is usually abuses towards women that are reduced to questions of custom while the injustices endured by men engender international human rights condemnation.[956]

As such, the feminist critique of international human rights law laments human rights law's deference to culture as a legitimate form of relativism that protects gender oppressive cultures. Non-western feminist scholars, however,

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Afghanistan); *See also*, Karima Benounne, *Remembering the other's others: Theorizing the approach of International law to Muslim Fundamentalism*, 41 COLUM. HUM. RES. REV. 635 (2010).

[949] *See, e.g.*, Opus v. Turkey, Eur. Ct. H.R. No. 33401/02, ¶¶ 158–76 (2009) (domestic violence); Eremia v. Moldova, Eur. Ct. H.R. No. 3564/11, ¶¶ 48–66 (2013) (rape) I.G. & others. v. Slovakia, Eur. Ct. H.R. No. 15966/04, ¶¶ 112–26 (2013) (forced sterilization).

[950] *See, e.g.,* Opuz v. Turkey, 2009-III Eur. Ct. H.R. 107.

[951] *See, e.g.,* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (1990).

[952] ALICE EDWARDS, VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL HUMAN RIGHTS LAW 219–29 (2011); *see generally,* Agnès Callamard, *The Human Rights Obligations of Non- State Actors*, in HUMAN RIGHTS IN THE AGE OF PLATFORMS 191, 204 (Rikke Frank Jørgensen ed., 2019).

[953] *See, e.g.,* Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87, 100 (1993).

[954] *See, e.g.,* Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49, 69 (1993).

[955] For a defense and account of the doctrine of cultural relativism in international human rights law, *see* Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 4 (6) HUM. RTS. Q. 400 (1989).

[956] Celia Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87, 97 (1993) (questioning "why white supremacy belongs to the 'community while male supremacy belongs to the individual).

took pain to adjust this critique and reject the essentialist tendencies among some feminists and policymakers.[957] to characterize whole cultures as bad for women. Problematizing the assumption in both human rights law and in feminism that culture is a static monolith, they emphasized that cultures and religions are negotiable, dynamic practices that are rarely unified.[958]

Non-western feminists also highlighted the imperialist bias of the western feminist cultural relativist critique by pointing to the preoccupation with so-called 'cultural practices' affecting non-Western women (as well as minority and immigrant women in the West), while failing to appreciate the ways in which cultural and religious norms limit women's human rights in the 'developed' world.[959] They noted how the customs which human rights law has deemed inherently oppressive—female circumcision, honor-crimes, child marriage, and polygamy[960]—are drawn from non-Western religious or customary practices, but the habitual discriminatory rites of Christians, including those that reject women's leadership capacities, enforce heterosexuality, and limit women's access to reproductive choice, escape the label of 'harmful practices.'[961] Reminding everyone that patriarchy governs societies north and south, non-western feminists illustrated the reticence of the West to understand that the norms which define gender relations in western countries are just as 'cultural' as those in the 'third-world.'[962] Under this view, deference to custom and culture in international human rights law risks reifying patriarchy in the global north and global south alike.

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[957] *See, e.g.,* Susan Moller Okin, *Is Multiculturalism Bad For Women?* in (Joshua Cohen, Matthew Howard & Martha C. Nussbaum eds., 1999); Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49, 69 (1993).

[958] *See, e.g.*, Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights*, 15 MICH. J. INT'L L. 307 (1994); Ratna Kapur, *Postcolonial Erotic Disruptions: Legal Narratives of Culture, Sex, and Nation in India*, 10 COLUM. J. GENDER & L. 333 (2001).

[959] For the Non-western feminist critique of western feminism's tendencies to condemn non-western cultures as gender oppressive (without proof), and to present non-western western women as powerless within these cultures, *See, e.g.,* Chandra Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourse* 89 in THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM (Chandra Mohanty ed., 1992); Ratna Kapur, *Revisioning the Role of Law in Women's Human Rights Struggles* in THE LEGALISATION OF HUMAN RIGHTS: MULTIDISCIPLINARY PERSPECTIVES, (Saladin Meckler-Garica and Basak Cali eds.. 2006); Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUM. RTS. 89 (2000);
Vasuki Nesiah, *The Ground Beneath Her Feet: "Third World" Feminisms,*" 4(3) J. OF INT'L WOMEN'S STUD. 30; Anne Orford, *Feminism, Imperialism and the Mission of International Law*, 275 HARV. HUM. RTS. J. 1, 18 (2002).

[960] For example, the 2014 Joint CEDAW-CRC General Recommendation/Comment on Harmful Practices CEDAW/C/GC/31. CRC/C/GC/18 condemns a litany of abuses known to be more common in Africa, the Middle East, and Asia, including, but not limited to, honor crimes, FGM, child marriage, and polygamy.

[961] *See, e.g.*, Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399 (2003); Ratna Kapur, *Postcolonial Erotic Disruptions: Legal Narratives of Culture, Sex, and Nation in India*, 10 COLUM. J. GENDER & L. 333 (2001); Karen Engle, *After The Collapse of The Public/Private Distinction: Strategizing Women's Rights,* in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 143 (Dorinda G. Dallmeyer ed., 1993); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defence,"* 17 HARV. WOMEN'S L. J. 57, 78; *See also,* SALLY ENGLE MERRY, HUMAN RIGHTS, AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 11-16 (2006).

[962] *See, e.g.,* Catherine Powell, Introduction: *Locating Culture, Identity and Human Rights*, 30 COLUM. HUM. RTS. L. REV. 201 (1999).

2. *The public/private divide in abortion law jurisprudence*

Operating as a veil to keep women's experiences of human rights abuse beyond legal intervention, the reproduction of the public/private divide in human rights law can explain, in part, human rights law's failure to address the gendered aspects of abortion regulation. The divide is visible, albeit in a more complex form, in two ways. First, human rights law insulates the gendered roots of policies and practices that deny women abortions from review. Second, by treating abortion primarily as an issue of healthcare rather than an issue of gender inequality, the doctrine conceals many of the subordinating harms of anti-abortion laws.

a. The Hidden Roots

Current human rights law approaches shield the state from scrutiny of the gender-based discrimination underlying abortion restrictions in two ways. First, human rights law treats anti-abortion laws as an issue of culture over which human rights law has a limited supervisory role. Second, international human rights law mischaracterizes the root causes—or perpetrators—of abortion denial to indirectly limit its review of the state's perpetration of gender inequality.

Europe's regional human rights system explicitly categorizes abortion regulation as a matter of "domestic morality," with the result that the law limits its oversight of any human rights violations occasioned by national abortion restrictions. In *Bruggemann and Scheuten v. Federal Republic of Germany*[963] the European Commission asserted that Germany's criminal restrictions on abortion implicated aspects of a woman's right to private life but did not find in favor of women who challenged the anti-abortion regulation.[964] Adopting a relativist approach, the Commission concluded that since that all European Convention member states had their own "heated debates" and "own legal rules" on abortion, Germany could not be liable for violating the women's right to privacy.[965] Because European States governed abortion in accordance with their own national norms, the Court recused itself and nullified the human rights violations suffered by the applicants.

Similarly, in *A, B & C v. Ireland*[966] (a case that has been discussed many times in this dissertation) the European Court of Human Rights addressed the impugned harms of Ireland's abortion regulation within the sphere of Article 8 (the right to private life); and reasoned that by preventing applicants 'A' and 'B' from getting a legal abortion in Ireland, the country's abortion

[963] *Bruggemann and Scheuten*, *supra* note 81 at ¶ 50.
[964] *Id.* ¶ 50.
[965] *Id.* ¶ 53.
[966] *A, B, & C v Ireland*, *supra* note 12.

law did, in fact, interfere with the women's right to privacy. But the Court shifted its attention away from the impairment the women's rights by classifying abortion as an issue of "domestic morality"[967] on which the state was entitled to almost total deference. Asserting that Ireland's interference with the women's privacy rights fell within the European Convention's permissible grounds[968] for limiting the right to private life, namely the protection of morals, the state's responsibility for respecting women's rights evaporated. Reasoning that the Irish Government's "direct and continuous contact with the vital forces of their country" empowered the state to ascertain the content and requirements of national morals, the Court accepted that the human rights implications of criminalizing women who get abortions was a legitimate means of protecting national mores.[969]

Notably, the state's assertion that the purpose of the 8th amendment was the protection of national norms about abortion engendered no scrutiny; the Court accepted—without question—that the 8th amendment was designed to protect "the profound moral views of the Irish people which demanded strong protection for prenatal life."[970] But as set out in Part 1, if considered through a gendered lens, the value of unborn life was not the only ideology underlying the 8th amendment; the law expressed a vision of Irish women as bearers and mothers of the Irish race and attempted to enforce this role through punitive sanction.

Moreover, as feminist international law scholars have underscored, there is a danger in resorting to cultural explanations for women's subordination; invocations of culture, tradition, and custom, particularly by those in power, often make it seem as though violations of women's rights are intractable and almost natural features of their societies.[971] But feminists argue that imposing religious, moral, or cultural beliefs on others through law or public policy is a political act, not an exercise of cultural rights.[972] And in the abortion context, not only was the regulation misrepresented as an issue of national morality, but in doing so, the European Court also rejected the moral autonomy of the thousands of women who travelled abroad every year to end their pregnancies.

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[967] *Id.* at ¶263 - 264.

[968] According to the text of European Convention, States can limit "personal freedoms" (Articles 8-11 of the Convention, including the right to private life), where "necessary in a democratic society, in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[969] *ABC, supra* note 12 at ¶ 232.

[970] *Id.*at ¶227.

[971] *See, e.g.,* Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399 (2003).

[972] *See, e.g.,* Farida Shaheed (Special Rapporteur in the Field of Cultural Rights), *Report,* U.N. DOC A /67/287; Farida Shaheed, *Violence Against Women Legitimised by Arguments of "Culture"—Thoughts from a Pakistani Perspective*, in DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE 241 (Carin Benninger-Budel ed., 2008).

By not imposing responsibility on States for violations committed in service of 'national morality, the European Court ignores the inequalities engendered by anti-abortion laws. But as described in Chapter 2, international human rights law does not entirely absolve States from responsibility in the context of abortion; current doctrine holds States accountable for not applying their own *domestic laws* on abortion access. Following the human rights law principle that human rights must not be "theoretical or illusory" and must be accessible,[973] human rights bodies have upheld women's access to abortion in situations where national law *already* legalizes access in certain circumstances but where third parties deny women that access. For example, in four abortion cases at the European Court of Human Rights—*Tysiac v. Poland*, *P & S v. Poland*,[974] *R.R. v Poland*,[975] and Ms. C in *A, B, and C v Ireland*—and two of the abortion cases at the Human Rights Committee—*LMR v Argentina*[976] and *KL v. Peru*[977]—the respective human rights bodies held that the States in question had violated a woman's right to private life—and in some cases, her right to be free from cruel, inhuman, and degrading treatment—in contexts where the woman's circumstances qualified her for an exception-based abortion, but her rights were denied by individuals or institutions (such as individual doctors or hospitals).[978]

While closing the implementation gap between legal rights and practically enforcing them is usually a welcome development in human rights law, the result is that human rights bodies opt to underscore exemption-based abortion laws rather than examine such laws from a human rights or gender perspective. From a gender perspective, the scope of review is unduly narrow. In each case, human rights bodies found against the respective state on the grounds that the state was obliged to provide procedural safeguards or regulatory guidance clarifying legal exemptions to national abortion bans to protect women's rights. Matters distinct from the underlying criminal abortion laws—the "procrastination of the health professionals"[979] or inadequate regulatory guidance[980]— occasion scrutiny by the human rights bodies at the expense of the state's role in legitimizing the denial of reproductive choice through its own legislation.

On one hand, courts (and quasi-courts in this instance) can be forgiven for confining their review to narrow grounds, but in most of the aforementioned cases, human rights bodies were directly called upon to

[973] *See, e.g., Tysiąc, supra* note 392 at ¶113.
[974] *P & S v. Poland*, *supra* note 569.
[975] *R.R. v. Poland, supra* note 472.
[976] *LMR v. Argentina*, *supra* note 507 at ¶7.2.
[977] *KL v. Peru*, *supra* note 543.
[978] *See also* Joanna Erdman, *The Procedural Turn: Abortion at the European Court of Human Rights, in Abortion Law* in TRANSNATIONAL PERSPECTIVES: CASES AND CONTROVERSIES 121 (Rebecca J. Cook, Joanna Erdman & Bernard Dickens eds., 2014).
[979] *See, e.g., R.R. v. Poland, supra* note 472 at ¶159. See also, *Tysiac, supra* note 392 at ¶180.
[980] *Id.*

address state action on abortion beyond the state's duty to enforce its own law. In *LMR*—where a hospital refused to provide an abortion even though the woman's pregnancy fell within the rape exemption of the national abortion ban—the applicant requested, as part of her claim, that the Human Rights Committee urge Argentina to review its domestic legal framework for abortion and to decriminalize abortion access.[981] Notwithstanding the direct call to scrutinize the state's anti-abortion legislation, the Human Rights Committee confined its review to the illegal and arbitrary interventions by judicial officials and medical professionals.

Similarly, in *Tysiac* — the Polish case where a woman's health was risked by her pregnancy, but her doctors would not issue her the necessary certification for her to get a health-based legal abortion[982] — the European Court avoided the applicant's facial challenge against Poland's abortion restrictions. Without explanation beyond noting "the circumstances of the applicant's case and in particular the nature of her complaint," the Court confined its review to Poland's "positive obligations" to implement its national abortion law.[983] The European Court did the same in the *A, B & C* case; though the applicants' challenged Ireland's abortion ban, the only State action that received full review was the failure to implement national law.[984]

Again in *RR*, the European Court asserted that the hospital's failure to provide diagnostic testing and an abortion violated the woman's rights and that insofar as the state was liable, it was on the grounds that Poland lacked procedures and regulations to ensure that RR was able to make "an informed decision as to whether to seek an abortion or not in good time."[985] Notwithstanding the role of RR's doctors in frustrating her access to diagnostic tests that would have sanctioned of her abortion, fundamentally, the reason that RR could not get an abortion was because her pregnancy exceeded the state's legal time limit on abortion (20-weeks).[986] Instead of impugning Poland, the Court presented individual actors as the perpetrators of RR's forced pregnancy and childbirth.

To be sure, in terms of requiring States to implement domestically recognized abortion rights, commentators suggest that international human rights law can do important work in protecting women from arbitrary refusal of care by health professionals.[987] As with the human rights law approach of categorizing abortion as an issue of 'domestic morality,' scrutiny of state

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[981] *LMR v. Argentina*, *supra* note 507, ¶ 3.11.
[982] *Tysiac*, *supra* note 392 ¶18.
[983] *Id.* at ¶ 107
[984] A, B, & C v. Ireland, *supra* note 12.
[985] *Id.*at ¶203.
[986] *Id.* at ¶204.
[987] *See also* Joanna Erdman, *The Procedural Turn: Abortion at the European Court of Human Rights, in Abortion Law* in TRANSNATIONAL PERSPECTIVES: CASES AND CONTROVERSIES 121 (Rebecca J. Cook, Joanna Erdman & Bernard Dickens eds., 2014).

measures that control women is displaced. The power dynamics that restrict women's access to abortion go unperturbed.

Departing from the sex and gender-blind approaches of the aforementioned litany of cases, the CEDAW Committee, and more recently, the Human Rights Committee has displayed a willingness to examine the discriminatory basis of abortion denial in its jurisprudence. In a decision that was considered as a potentially innovative juridical resource for reforming abortion laws,[988] the CEDAW Committee's decision in *LC*[989] characterized the denial of reproductive rights as a discriminatory restriction on a woman's right to health under Article 12 of CEDAW (the duty to eliminate discrimination against women in the field of health care).[990] As in the preceding cases, per national law, the plaintiff should have been able to access an exception-based legal abortion (in this case, under Peru's risk to life exemption). The Committee recognized LC's suffering upon being denied an abortion and condemned it as discrimination.[991] In articulating the source of her discrimination, the Committee described LC's mistreatment as stemming from 'her status as a pregnant woman.'[992] Thereby submitting that LC had been discriminated against because of her reproductive capacity.

While it is welcome that the CEDAW Committee held that LC was discriminated against as a woman, the fact that women have a different reproductive capacity to men does not explain why States deny women the right to abortion. States restrict women from accessing abortion because the state decides it appropriate to deny women access and designs limits accordingly. Invariably, the logic behind such restrictions include gendered judgments about whether women's authority over reproduction can be usurped and what burdens can be imposed on women.[993] Moreover, when discrimination is conceived as rooted in the biological differences between women and men, the required form of redress is moderated. The state's responsibility in ending any sex or gender discrimination becomes one of "accommodating women's differences"[994] and achieving de facto equality. Rather than upending socially engineered gender hierarchy, the state is asked to respond to differences between the sexes.

To a certain extent, the CEDAW Committee appears to have attempted to recognize the gender dynamic in *LC*: as well as citing her status as a

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[988] *See, e.g.,* Charles Ngwena, *A Commentary on LC v Peru: The CEDAW committee's first decision on abortion,* 57(02) J. OF AFRICAN L. (2013).
[989] *LC v. Peru*, *supra* note 374.
[990] *Id.*at ¶ 7.5
[991] *Id.* at ¶ 7.7.
[992] *Id.* at ¶ 8.15.
[993] *See, e.g.,* Neil Siegel and Reva Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. 160 (2013); Anita Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender and the Constitution,* 18 HARV. J. L. & PUB. POLY 419, (1994).
[994] Rebecca Cook, *Accommodating Women's Differences, supra* note 17.

pregnant woman as the reason for her ill-treatment, the Committee reasoned that LC had been denied access to a legal abortion because of "the stereotype that protection of the fetus should prevail over the health of the mother."[995] Though the phenomenon identified by the Committee as a stereotype is not, in fact, a stereotype, the reasoning is welcome for its indication that the Committee understood the role played by gendered expectations in denying women abortion rights.

The landmark cases of *Mellet*[996] in 2016, and the almost identical case of *Whelan v Ireland*[997] in 2017, are the only international human rights decisions in which a human rights body (the Human Rights Committee) has explicitly held that criminalizing and prohibiting abortion violates international human rights law; and that, at least in certain circumstances, States must make abortion legal. To recap, both *Mellet* and *Whelan* challenged Ireland's abortion ban in situations where pregnancies have fatal fetal abnormalities.

As stated elsewhere in this dissertation, the Committee's decisions in these cases marked a significant development in abortion law jurisprudence because the underlying legal framework, not just the state's failure to implement its own law, was impugned for its non-compliance with the ICCPR. Successes notwithstanding, the Human Rights Committee pursued a strange line of reasoning to reach its finding of discrimination. Engaging in a formalistic comparative analysis, the Committee compared how Ireland treated the applicants 'as women who decided to terminate their non-viable pregnancies' to the state's treatment of 'women who had non-viable pregnancies but decided to carry the fetus to term.[998] The women who did not choose to end their pregnancies continued to receive the full protection and care of the public health system in Ireland, and all medical needs were covered by health insurance, while women who decided to abort non-viable pregnancies had to travel for care abroad at their own expense.[999] This differential treatment was judged to violate the right to equality before the law on the basis of both socio-economic and sex under Article 26, ICCPR.[1000]

While acknowledging that the criminalization of abortion inflicts socio-economic burdens on women who are forced to travel for abortions is welcome, the Court's holding is limited in a number of ways. There was no explanation for how the differential treatment between the two sets of women amounted to 'sex discrimination. And the finding of discrimination related to a small cross-section of women—women with non-viable pregnancies—

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[995] *LC v Peru*, *supra* note 374 at ¶11.3.
[996] *Mellet, supra* note 35.
[997] *Whelan*, *supra* note 35.
[998] *Mellet*, *supra* note 35 at ¶ 7.1; *Whelan, supra* note 35 at ¶ 7.1
[999] *Mellet*, *supra* note 35 at ¶ 7.3; *Whelan, supra* note 35 at ¶ 7.4
[1000] *Mellet*, *supra* note 35 at ¶ 7.1; *Whelan, supra* note 35 at ¶ 7.1

rather than all of the women who faced widespread discrimination in accessing abortion in Ireland. Blind to the implications of the abortion law for women as a class, the majority decision was blind to gender.

Notably, the concurring opinions of Professor Sarah Cleveland in *Mellet* and *Whelan* took a different approach to make a finding of sex discrimination. Rejecting the Irish Government's claim that there can be no invidious discrimination in relation to a pregnant woman because "her physical capacity or circumstances in a state of pregnancy are inherently different to that of a man"[1001]Cleveland cited the CEDAW Committee's approach in *LC* to make a finding of sex-based discrimination.[1002] Observing that there was no equivalent burden on men's access to reproductive health care in Ireland,[1003] and that the state had not justified this differential treatment,[1004] she asserted that the inability of Irish women to get abortions legally in Ireland amounted to sex discrimination under international human rights law.[1005]

Again, while it is welcome that Ireland's abortion law was impugned as discriminatory on the basis of sex, the traps of physiological sex-based reasoning could have been realized in this case. In the first instance, Cleveland identified the "protection, on an equal basis, in law, and in practice, the unique needs of each sex"[1006] as among the state's responsibilities towards women in the abortion context - a limited approach to ending gender subordination. And as with *LC*, Mellet and Whelan did not suffer abortion denial because their biology was different to men's; the state's criminal abortion laws prevented women from having abortions in Ireland. These were laws that were motivated and sustained by gender stereotypes. However, Cleveland's individual opinion contains the seeds of positive developments and could signal a new phase in the Committee's abortion jurisprudence. Distinct from other human rights-based approaches to abortion to date, Sarah Cleveland added to the biological sex-difference approach and recognized that Ireland's abortion law differentiated between men and women "based on gender stereotypes" in a way that gave "rise to gender discrimination."[1007] For Cleveland, the ICCPR's right to equal protection and protection against gender discrimination forbid "traditional stereotypes

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[1001] *Mellet supra* note 35 at ¶ 4.13. For more on the risks of emphasizing the different biology of men and women, *See* Katharine T. Bartlett, *Comment, Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532, 1732 (1974) ("That women may and do become pregnant is the most significant single factor used to justify the countless laws and practices that have disadvantaged women for centuries."); *See also,* Wendy Williams, *The Equality Crisis: Some Reflections. On Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REV. 175 (1982); Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325-380 (1984-1985).

[1002] Sarah Cleveland, Annex II at ¶ 11.1

[1003] *Id.* at Annex II ¶11.3.

[1004] *Id.*

[1005] *Id.*

[1006] *Id.* at Annex II, ¶ 7.

[1007] *Id.* at Annex II ¶ 16.

regarding the reproductive role of women."[1008] Additionally, in a stark departure from the approach of the European Court of Human Rights, Cleveland dismissed the state's argument that the abortion restrictions reflected domestic morality and emphasized that justifications for abortion restrictions based on "tradition, history and culture" could not justify gender discrimination or gender stereotypes.[1009]

Interventions in the aforementioned concurrences in *Mellet* and *Whelan* aside, when presented with the denial of abortion rights, human rights bodies have thus far insulated states' perpetuation of gender inequality from review. A correct interpretation of anti-abortion laws requires engagement with the gendered roots of laws that deny women's reproductive autonomy and an understanding of the mechanisms through which this manifestation of discrimination sustains itself. By contrast, in obscuring the role of gender bias in abortion law and policy, international human rights law hides the discriminatory purposes of anti-abortion laws and contributes to their maintenance.

b. The Hidden Harm

In 2011, the then UN Special Rapporteur on the right to health, Anand Grover, powerfully articulated that laws criminalizing abortion lead to higher numbers of maternal deaths and poor mental and physical health outcomes while "infring[ing upon] women's dignity and autonomy by severely restricting decision-making by women in respect of their sexual and reproductive health."[1010] This marked the first time that abortion was explicitly conceived as part of the right to health by the mandate of the UN Special Rapporteur and was perceived as a milestone. As noted in Chapter 2, the CESCR Committee followed suit in 2016 and explicitly embraced access to abortion as part of the right to health in General Comment 22.[1011] In a world where an estimated 8-15% of maternal deaths are associated with unsafe abortions, conceiving of abortion access as critical to women's health seems both urgent and indisputable.

But this framing is complex. When abortion is principally conceived as a matter of health and medical treatment, the critical importance of reproductive control to a woman's equality is overlooked. *KL v Peru* is expositive of this approach. Rather than engaging the applicant's claim that the state had interfered with her right to make autonomous decisions about

[1008] *Id.*
[1009] *Id.* at Annex II ¶ 15.
[1010] Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *supra* note 462, ¶21.
[1011] CESCR General Comment 22 on the right to sexual and reproductive health, *supra* note 349.

reproduction and parenthood, the Committee held that the "state interfered arbitrarily in her private life by denying her the opportunity to secure medical intervention."[1012] While "medical intervention" is one way to characterize her request, KL's reason for wanting an abortion was to be free of an unwanted pregnancy — a decision and desire that implicates much more than medical needs. As described in Part 1, the decision to carry a pregnancy to term can impact every aspect of a woman's life – her education, her career, her relationships, her economic status, and, more broadly and her ability to live the life she chooses.[1013] The state's attempt to take that decision away from women represents a fundamental rejection of women's status as equal citizens. But by confining its assessment to a medical view of pregnancy, the Committee lets the state off the hook for its discriminatory treatment of women.

Such health-focused reasoning is also reflected in the CEDAW Committee's approach to abortion in individual decisions and concluding observations: as described, the Committee addresses abortion as an aspect of healthcare—"medical services that only women need"—the denial of which is discriminatory under the CEDAW Convention.[1014] A majority of the Human Rights Committee applied this reasoning in *Mellet* and *Whelan*, holding that Ireland's abortion law violated the women's right to privacy by arbitrarily interfering with their decision "as to how best cope with a non-viable pregnancy."[1015] For *Mellet* and *Whelan*, however, the state's intervention impacted more than their medical decisions. In their time of need, the state criminalized the women's response to pregnancies with fatal fetal anomalies and exiled the women from the state. Such dignitary harms receive no airtime, and the state's responsibility was reduced to providing the equal medical treatment.

Moreover, in practice, the health paradigm can result in a medical model for abortion, where abortion becomes a matter of physician (or hospital) authority rather than a matter of women's rights.[1016] The litany of cases in this dissertation reveal numerous controversies involving doctors and hospital

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[1012] *KL v. Peru, supra* note 453 at ¶ 6.4.

[1013] *See also* Jennifer Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, (2010) 45 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 330; Ruth Bader Ginsburg, *A Postscript to Struck by Stereotype*, 59 DUKE L.J. 799, 800 (2010); Anita Allen, *The Proposed Equal Protection fix for abortion law: reflections on citizenship, gender and the constitution*, 18 HARV. J. L. & PUB. POLY 419, (1994).

[1014] *See, e.g.,* Committee on the Elimination of Discrimination Against Women, Concluding Observations: Oman, ¶41, U.N. DOC. CEDAW/C/OMN/CO/1 (2011); Committee on the Elimination of Discrimination Against Women, Concluding Observations: Paraguay, ¶31, U.N. Doc. CEDAW/C/PRY/CO/6 (2011).

[1015] *Mellet, supra* note 35 at ¶7.8; *Whelan*, *supra* note 35 at ¶ 7.7.

[1016] This has been realized worldwide, with endless cases and controversies involving doctors and hospital boards refusing to carry out legal abortions or creating additional barriers. Some of these cases have reached the IHLR courts, including *Tysiac*, *supra* note 392. *RR v Poland ,supra* note 472; *K.L. v. Peru*, *supra* note 453 at ¶ 6.4; L.M.R. v. Argentina, Committee, *supra* note 507; Kristin Lucker and others have commented on the conflict between the vision of feminist abortion rights groups mobilizing on behalf of women and the goal of medical professional to ensure professional autonomy.

boards refusing to carry out legal abortions or creating additional barriers to women's access. But to date, the law has not vested the abortion decision in the woman alone. In some cases, it has even buttressed the physician's role. In *LMR v Argentina*,[1017] the applicant claimed that the state arbitrarily interfered in her private life by making a decision concerning her life and reproductive health on her behalf.[1018] In finding in her favor, the Human Rights Committee again downplayed *LMR*'s claim to a right to make decisions about her life. Instead, the Committee held that Argentina had violated LMR's right to privacy by interfering in an issue that "should have been resolved between the patient and her physician."[1019]

It is recognized that focusing on the impact to a woman's life and health is not as contentious as is her right to make decisions about her own body and life plan and that in the battlefield of abortion lawfare, muting controversy can seem imperative.[1020] But by diverting attention away from the impacts of abortion restrictions on women's autonomy and freedom from discrimination, health-based claims ignore why abortion restrictions exist in the first place: the conditions of inequality that enable the state to control such aspects of women's lives. Even in parts of the world with high maternal mortality rates from unsafe abortion, recognizing the ways that abortion restrictions violate the right to health are not enough. The underlying causes of morbidity and mortality from unsafe abortion are not blood loss and infection but, rather, laws and policies borne of apathy and disdain toward women.

3. The Victim Trap

The feminist critique of international law also problematizes the law's reinforcement of stereotyped understandings of women as powerless and vulnerable victims.[1021] Without denying that, in reality, women are frequently victims of abhorrent levels of human rights abuse; a number of scholars have contested the law's reliance on overly generalized depictions of women as disempowered victims, which may not be liberating. On one level, the trope imperils the application of human rights law to women who do not conform

[1017] *LMR v. Argentina*, *supra* note 507 at ¶ 7.2 (UN Human Rights Committee 28 Apr. 2011).
[1018] *Id.*at ¶ 3.2.
[1019] *Id.*at ¶ 3.2.
[1020] *See, e.g.,* Joanna Erdman, *The Politics of Global Abortion Rights* 22(2) BROWN J. OF WORLD AFF. 39; Lindgren, Yvonne, *The Rhetoric of Choice: Restoring Healthcare to the Abortion Right* 64 HASTINGS L.J. 385 (2013) (arguing that recognizing abortion as healthcare may create broader appeal for the right by casting it in a gender-neutral context).
[1021] *See, e.g.,* Dianne Otto, *Lost in translation: Re-scripting the sexed subjects of international human rights law in* INTERNATIONAL LAW AND ITS OTHERS 320 (Anne Orford eds. 2006). (Otto contends that the stereotyped understandings of women in international human rights law takes three main forms: female subjectivities as wife and mother, the woman who is the 'formal equal' of men in the public sphere (but not the private), and the "victim" subject who is produced by colonial narratives of gender and women's sexual vulnerability).

with traditional gender scripts of victimhood that emphasize vulnerability, passivity, and respectability. Securing human rights protection for sex workers, women with minority sexual orientations and/or gender identities, and women who are members of minority religious or belief communities (but who do not reject their religion identity) has been, and continues to be, wrought with tension and backlash, if not outright rejection.[1022] On another level, scholars caution against the woman-as-victim narrative because it presents women as objects in need of protection rather than subjects of affirmative rights.[1023] For post-colonial feminists, this paternalistic vision of women is reminiscent of the imperialist practice of portraying colonial subjects as ignorant and vulnerable "others."[1024] Recognizing that such narratives provided colonists with partial explanations for maintaining power over their colonial subjects, feminists question whether containing women's presence in international law within the prism of 'victimhood' could operate to "keep women in their place."[1025]

Notably, most of the cases surveyed in this dissertation involve an extreme or tragic situation: women impregnated as a result of rape; women with pregnancies that are either nonviable; or women whose health and life are at risk. Often, but not always, the plaintiffs are young girls or are challenged with circumstances that gives rise to heightened suffering, such as disability or bereavement. In each of these "exceptional cases," the woman is viewed as a victim in need of the law's protection. Indeed, the greater her victimhood, the more protection the law owes her. This trend can be attributed to the legal strategy of advocates who correctly consider tragic cases to be likely winners before adjudicators. But there is an inherent tension to this approach: by confining its recognition of abortion rights to 'exceptional' cases, human rights law remains blind to the rights of the majority of abortion-seeking women. As well as instituting a protection gap for women's rights, this doctrine reinforces narrow conceptions of the deserved abortion and the

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[1022] *See, e.g.*, Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1 (2002).

[1023] *Id.*

[1024] *See, e.g.*, Vasuki Nesiah, *Toward a Feminist Internationality: A Critique of US Feminist Legal Scholarship* (1993) 16 HARV. WOMEN'S L. J. 189 (explaining that "a discourse about the experience of oppression often participates in the imperially charged agenda of defining "Third World" women as victims of oppression"); *See* Anne Orford, *Feminism, Imperialism and the Mission of International Law,* 71 NORDIC J. OF INT'L L. 275, 290 (2002); Saba Mahmood, *Feminist Theory, Embodiment, and the Docile Agent: Some Reflections on the Egyptian Islamic Revival*, 16 CULTURAL ANTHROPOLOGY 202 (2001); *See also,* Brenda Cossman, *Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project*, 1997 UTAH L. REV. 525, 528 (1997).

[1025] *See, e.g.*, Vasuki Nesiah, *Toward a Feminist Internationality: A Critique of US Feminist Legal Scholarship*,16 HARV. WOMEN'S L. J. 189 (1993) (explaining that "a discourse about the experience of oppression often participates in the imperially charged agenda of defining " Third World" women as victims of oppression"); *See also* Anne Orford, *Feminism, Imperialism and the Mission of International Law* 71 NORDIC J. OF INT'L L. 275, 290 (2002); Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1 (2002); Saba Mahmood, *Feminist Theory, Embodiment, and the Docile Agent: Some Reflections on the Egyptian Islamic Revival*, 16 CULTURAL ANTHROPOLOGY 202 (2001); *See also* Brenda Cossman, *Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project*, 1997 UTAH L. REV. 525, 528 (1997).

deserving woman.[1026] Only the women who have "innocently suffered" are recognized by human rights law.[1027] As young girls who had been raped, *LC, KL, LMR, RR*, and *P* could elicit recognition of their suffering. And as women who had only chosen abortions because their pregnancies would not survive, *Mellet* & *Whelan* were not rejecting motherhood. In fact, both women framed their decisions to get abortion as motivated, in part, by their desire to protect their unborn fetuses.[1028]By contrast, women who have consensual sex and want abortions to control their lives fail to engender compassion, and as such, fall beyond the law's protection. Their abortion decisions cannot be excused as a response to rape or a natural motherly instinct. Echoing the themes of responsibility and irresponsibility that play a prominent role in rhetoric opposing reproductive choice, human rights law further entrenches abortion in a moralistic rather than rights-based framework.

Additionally, even when a woman falls within one of the exceptional and tragic cases, the law does not afford women with the primary decision-making authority over their reproduction. Even the most 'deserving' women remain subject to the State's final say on whether she falls within one of the exceptions for a legal abortion.

Furthermore, it seems that only particular tragedies are compelling enough for human rights law. In practice, the discriminatory impacts of exceptions-based abortion laws are felt most acutely by women in lower socio-economic groups. Women with financial resources are more likely to be able to access private clandestine providers who will fudge the criteria for a legal abortion for a price or will travel to states with fewer restrictions.[1029] Without these options, women from lower socio-economic backgrounds are more likely to endure unsafe abortions,[1030] and are more likely to face legal penalties for obtaining illegal abortions.[1031] Being poor and desperate to end a pregnancy to the point that you will risk your life and health to get an abortion is apparently not tragic enough a situation for human rights law to rescue you.

To be sure, human rights law's increasingly progressive jurisprudence on abortion has delivered long-awaited recognition of the abuse women suffer when they are denied access to abortion. In this regard, Yadh Ben Acor's description, in his concurring opinion, of the harm perpetrated by Ireland's abortion law stands out:

[1026] *See* Lisa M. Kelly, *Reckoning with Narratives of Innocent Suffering in Transnational Abortion Litigation*, in ABORTION LAW IN TRANSNATIONAL PERSPECTIVES 303, 317–18 (Rebecca J. Cook, Joanna N. Erdman & Bernard M. Dickens eds., 2014).
[1027] *Id.*
[1028] *Mellet, supra* note 35 at ¶2.8; *Whelan*, *supra* note 35 at ¶ 2.1.
[1029] *See*, *e.g.*, Andrea Hunnes et al., *Induced Abortion According to Socioeconomic Status in Chile* 33(4) J. OF PEDIATRIC AND ADOLESCENT GYNECOLOGY 415 (2020); Haina Zafar, *Low Socioeconomic Status Leading to Unsafe Abortion-related Complications: A Third-world Country Dilemma* 10(10) CUREUS 2018.
[1030] Susheela Singh, *Abortion Worldwide 2017: Uneven Progress and Unequal Access,* GUTTMACHER (2018).
[1031] *See* Natalie Sedacca, *Abortion in Latin America in International Perspective: Limitations and Potentials of the Use of Human Rights Law to Challenge Restrictions* 32 BERKELEY J. GENDER L. & JUST. 109 (2017).

> [T]hrough its binding, indirectly punitive, and stigmatizing effects, the prohibition of abortion in Ireland targets women by virtue of being women and places them in a particular situation of vulnerability.[1032]

Similarly, in holding that Peru had violated *KL*'s rights to privacy and freedom from cruel, inhuman, and degrading treatment, the Human Rights Committee stressed KL's "special vulnerability as a minor girl."[1033] Emphasizing that *LC* was "a minor and a victim of sexual abuse," the CEDAW Committee agreed with the claimant that Peru had violated her right to health.[1034] In recognizing the applicants' suffering in *P. & S. v Poland*, the European Court described P as a "vulnerable and distraught teenager in a difficult life situation."[1035] Similarly, in concluding that the State was responsible for the violation of the claimant's right to be free from cruel, inhuman, and degrading treatment in *P & S v. Poland*[1036] the European Court emphasized the claimant's "great vulnerability," this time arising from her age and status as a rape victim.[1037]

On one level, by recognizing aspects of a victim's identity and circumstances that exacerbate their suffering, the doctrine offers valuable insights into how human rights violations can be compounded by age and other status. The emphasis on the victim's vulnerability, however, runs the risk that 'vulnerable' becomes a fixed attribute for women, with little discussion of the social and political—gendered—reasons that give rise to such vulnerability.[1038] "Woman" in international law is conceived as being innately vulnerable, whereas, in reality, women are forced into contexts that unjustifiably heighten their vulnerability to human rights abuses. In abortion rights' jurisprudence, as currently applied,[1039] the vulnerability lens does not address the underlying structural causes of women's vulnerability in the abortion context. A woman's suffering appears to be attributed to her age, her history of being an assault victim, or her status as a bereaved mother. While it is likely that such experiences exacerbate a woman's distress, the root cause of a woman's suffering when refused abortion access is the underlying legal

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[1032] *Mellet*, Annex 1 at ¶3.2.
[1033] *KL v Peru*, *supra* note 453 at ¶ 6.5.
[1034] *KL v Peru*, *supra* note 453 at ¶ 8.15.
[1035] *P. & S.* v. Poland, No. 57375/08, Eur. Ct. H.R. at ¶13.1 (2012).
[1036] *Id.*
[1037] *Id.* at ¶162.
[1038] *See, e.g.*, Finnoula Ní Aoláin, *Women, Vulnerability, and Humanitarian Emergencies*, 18 MICH. J. GENDER & L. 1 (2011) (describing the social nature of the vulnerabilities experienced by women in the context of humanitarian emergencies).
[1039] *Id.* (proposing a different framework for vulnerability that takes account of its gendered processes).

framework that cedes her reproductive autonomy to the State and/or to doctors.

It also seems counterproductive when international human rights law provides accounts of women's victimhood that are near totalizing. In *P & S*, the European Court held treatment of P was degrading in that it aroused "fear, anguish, and inferiority capable of […] debasing [her].[1040] The Committee Against Torture observed that a woman who is compelled to continue a pregnancy after rape experiences "constant exposure to the violation committed against her," which leads to traumatic stress and long-lasting psychological problems.[1041] Attesting that "[w]omen who are legally prevented from accessing abortion services are powerless.…," scholar Ronli Sopris explicitly relies on the idea that women are helpless victims when arguing for abortion rights.[1042] Trading in stereotypes of women as passive and defenseless, women's status as victims is further entrenched. Framed as passive containers of their abuse, it seems as though there is no escape.

As a consequence, when women escape, survive or resist, the law has trouble recognizing them as victims. In certain cases, the women who extricate themselves from their disempowered position and overcome barriers to abortion access are stripped of their status of victims in human rights law. In *A, B, & C v. Ireland*, the European Court recognized that the State had infringed A and B's right to private life, but the fact that the two women traveled abroad to get abortions meant that the State would not be held accountable for violating their human rights.[1043] In other words, by overcoming the burdens that Ireland placed on them—by exercising their agency—the women lost their status as rights-holders. No longer fitting the passive victim trope, the women who defied Ireland's abortion regime were dismissed by human rights law.

C. Implications for doctrine

It is relevant to consider whether the current framework of international human rights law could accommodate the dissertation's proposition that abortion rights should be conceived of as gender equality rights. To date, there have been some gestures in this regard.

As a general principle, non-discrimination guides the way each human right is to be respected, and as a substantive right, equality and non-

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[1040] *P & S v Poland*, *supra* note 569 at ¶158.

[1041] Concluding Observations of the Comm. Against Torture: Nicaragua, ¶16, U.N. Doc. CAT/C/NIC/CO/1 (2009); see also Conclusions & Recommendations of the Comm. Against Torture: Peru, ¶23, U.N. Doc. CAT/C/PER/CO/4 (2006) (recognizing the physical and mental pain associated with being compelled by the law to seek an illegal and unsafe abortion as a form of cruel, inhuman, and degrading treatment).

[1042] RONI SOPRIS, REPRODUCTIVE FREEDOM, TORTURE AND INTERNATIONAL HUMAN RIGHTS: CHALLENGING THE MASCULINISATION OF TORTURE, 184 (2013).

[1043] *A, B, and C v Ireland*, *supra* note 12, at ¶230-240.

discrimination provisions are omnipresent in the framework of the United Nations human rights system and most regional systems. To recap from Chapter 2, among the many formulations of the right to non-discrimination in international law, Article 2 of the ICCPR establishes the prohibition against discrimination, proscribing "distinctions, exclusions, or restrictions" of any kind in the exercise of any rights promulgated by the Convention, on a number of protected grounds, including on the basis of sex.[1044] This is reinforced by Article 3 of the ICCPR, which explicitly addresses gender equality by stating that States must ensure the equal rights of men and women. Similarly, Article 3 of CEDAW mandates states to guarantee women's equal enjoyment of Convention rights and fundamental freedoms as compared with men. International human rights law also provides a freestanding right to equality before the law for all persons and equal protection of the law, in Article 26 of the ICCPR.[1045]

Notably, international human rights law recognizes that sex-based discrimination amounts to gender-based discrimination.[1046] which is understood as discrimination arising from the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for the different sexes, "resulting in hierarchical relationships between women and men and in the distribution of power and rights favoring men and disadvantaging women."[1047] Furthermore, the CEDAW Convention is explicit in Article 5(a) that harmful gender stereotypes are among the forms of gender discrimination that States must address. Elaborating on this responsibility in General Recommendation no. 28, the CEDAW Committee outlined that "inherent to the principle of…gender equality is the concept that all human beings, regardless of sex, are free to make choices without the limitations set by stereotypes, rigid gender roles, and prejudices."[1048]

Taken together, the right to equality and the right to nondiscrimination in human rights oblige States to refrain from carrying out actions that create,

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[1044] *See also*, U.N. Hum. Rts. Comm., Report of the Human Rights Committee: General Comment No. 18, ¶7, U.N. Doc. A/45/40 (November 11, 1989) [hereinafter General Comment No. 18] Similar accessory provisions against discrimination can be found in most other human rights instruments, including the ICESCR, CRC, the IMWC, the ICRPD, and the UN Declaration on the Rights of Indigenous Peoples, *supra* note 562.

[1045] No such general provision for equal protection is found in the European Convention. However, Protocol No. 12 to the European Convention, promulgated in 2005, extends the non-discrimination principle beyond the scope of conventional rights by providing for a general prohibition of discrimination, which applies to any right set forth by law.

[1046] *See*, CEDAW, General Recommendation No. 28: *The Core Obligations of States Parties Under Article 2 of the Convention on the Eliminations of All Forms of Discrimination against Women*, 47th Sess., U.N. Doc. CEDAW/C/GC/28, ¶ 5 (Dec. 16, 2010) [hereinafter CEDAW, General Rec. No. 28]) (stipulating that 'although the Convention only refers to sex-based discrimination . . . [it] covers gender-based discrimination against women.)

[1047] CEDAW, General Rec. No. 28, supra note 89, at ¶5. The "Istanbul Convention," a legally binding treaty in Europe, adopts a very similar definition as follows: "gender" shall mean the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for women and men. S*ee*, Convention on Preventing and Combating Violence Against Women and Domestic Violence, November 5, 2011, C.E.T.S. No. 210 ¶ 3(c)): [hereinafter Istanbul Convention].

[1048] CEDAW, General Rec. No. 28, *supra* note 189.

whether directly or indirectly, gender-based discrimination, a category which is broad enough to encompass freedom from gender roles and the burdens such roles place on women's autonomy. The obligation encompasses positive obligations such that to protect and fulfill these rights, States must adopt measures to reverse or change discriminatory situations in their societies on the basis of the idea of equality and the principle of nondiscrimination.

Recent views emanating from the Human Rights Committee have demonstrated the Committee's willingness to include protection against harmful gender stereotypes within the meaning of "equal protection" under the ICCPR.[1049] Even at the European Court of Human Rights—an institution often partial to a formal conception of equality—several judgments have impugned harmful stereotypes regarding groups such as the people living with HIV,[1050] people with intellectual disabilities,[1051] and the Roma community[1052] as violations of non-discrimination.

As outlined in this Chapter, both the purpose and effects of abortion restrictions violate women's right to equality and non-discrimination in human rights law. On the one hand, abortion restrictions contravene the nascent anti-stereotyping principle in international equality law.[1053] because they are rooted in a gendered ideology that prescribes normative roles for women. On the other, the burdens that abortion restrictions place on women's autonomy perpetuate discrimination based on gender. As Yadh Ben Acor articulates in his concurrence in *Mellet*, through its "punitive and stigmatizing effects," abortion restrictive regulation "targets women, by virtue of being women." [1054] And because laws denying an individual's ability to obtain an abortion not only deny autonomous choices but also devalue an entire group of people, abortion restrictions have equality implications for women's status in society more broadly.

Arguably, the implications of abortion policies on women's autonomy can — and to an extent have been — conceptualized as violations of the right to privacy in international law.[1055] The interplay of both equality and autonomy was explicitly articulated in the concurring opinion of *Mellet*; noting that Ireland's abortion restrictions reduced Amanda Mellet to "an instrument of procreation" constitutes discrimination and infringes at once her freedom of

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[1049] *See, e.g.*, Prof. Sarah Cleveland in *Mellet* & *Whelan supra* note 12.

[1050] *Kiyutin v Russia* (2011) Application No 2700/10, Merits, March 10, 2011. Regarding HIV-based prejudice, see also I.B. v. Greece, App. No. 552/10, (October 3, 2013).

[1051] *Kiss v Hungary* Application No 38832/06, Merits (May 20, 2010).

[1052] DH & Ors v. the Czech Republic App. No. 57325/00, (Grand Chamber final judgment) (November 13, 2007).

[1053] *See*, Alexandra Timmer, *Judging Stereotypes: What the European Court of. Human Rights Can Borrow from American and. Canadian Equal Protection Law, 63(1)* AM. JOUR. OF COMPARATIVE L. 239 (2015).

[1054] *Mellet* & *Whelan supra* note 12.

[1055] *See supra,* Chapter II, Section iv. *See* also HRC General Comment 36 on the Right to Life outlining that while state restrictions on abortion are permissible, they must not arbitrarily interfere with women's privacy. Human Rights Committee, General Comment 36, *supra* note 71, at ¶ 8.

self-determination and her right to gender equality and personal autonomy."[1056] But for both substantive and pragmatic reasons, this dissertation contends that international human rights law should locate the abortion right in human rights law's protection for equality and non-discrimination on the basis of gender.

As a matter of strategy, for advocates, in particular, international law provides States with little room to justify discriminatory laws and practices against women. While non-discrimination is not an unqualified right, only in very limited circumstances can sufficient "objective and reasonable criteria" be invoked to justify exemptions from general laws and standards for combatting discrimination.[1057] Strict scrutiny must be applied, and the burden of proof rests with the State. Such a high level of scrutiny for the justification of distinctions does not apply to the right to privacy.[1058]

[1056] *Mellet,* Annex I, at ¶¶7, 9.
[1057] *See*, H.R. Comm., General Comment No.18: Non-Discrimination, 37th Sess., U.N. Doc. HRI/GEN/1/Rev.1 (November 10, 1989) and H.R. Comm., General Comment No. 28: Article 3 (Equality of Rights Between Men and Women), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000).
[1058] UN human rights law prohibits arbitrary interference with one's privacy while doctrine under the European Convention of Human Rights, States are afforded significant difference in limiting an individual's privacy rights "in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

CONCLUSION

On January 18, 2018, Michael Martin, then the leader of the opposition in Ireland, stunned the country (in particular his own socially conservative party) by backing repeal of the 8th amendment. In an impassioned speech to the Dáil, Martin spoke of how despite always having described himself as "pro-life," he had come to recognize the profound concerns which people had with the 8th amendment.[1059] "Women known to the public only by letters of the alphabet" had exposed the cruelty of the law, he said, before commenting that "if we are sincere about respecting their choices, we must act."[1060]

As is now well-known, Ireland did act. The Government proposed a referendum to repeal the 8th amendment, and the Irish people voted, overwhelmingly, for its removal. While the strength of the public's support for repeal—over two-thirds of those who voted favored reform—suggests that reform had been a long time coming, the triumph for abortion rights activists in 2018 contrasts sharply with the recalcitrance they confronted in decades past. Pro-choice activists had fought against the draconian law since its inception, but as described in Chapter 1, their efforts were chronically overpowered by anti-abortion campaigns and government impasse. Anti-abortion forces successfully pushed injunctions against family planning clinics, secured prosecutions against students for distributing abortion information, and even attempted to stop a 14-year-old rape victim to stop her traveling to England for a termination. Consumed with resisting even more restrictions on abortion access, pro-choice advocacy was almost exclusively defensive.

Taking a case on behalf of three women who had been denied abortions in Ireland to the European Court of Human Rights marked a new era. As described in Chapter 2 of the dissertation, this was the first time in the trajectory of Irish abortion politics that pro-choice actors proactively challenged Ireland's abortion law. And though the Court rejected the human rights claims of all but one of the litigants, the *A, B, & C* case produced both direct and indirect gains for the movement. The limited win for *C* forced the government to pass legislation in 2013 to clarify when a woman could access a life-saving abortion—an action the movement had sought for years. But the real strategic value came from the process surrounding the new law rather than the policy is produced. Placing abortion in the public and political domain as a woman's rights issue, the hearings for the implementation of *A, B, & C* initiated a change in the contours of public discourse on abortion.

[1059] Michael Martin, *Speech by Micheál Martin On Debate On Report Of Committee On 8th Amendment*, (January 18, 2018) https://www.fiannafail.ie/speech-by-micheal-martin-on-debate-on-report-of-committee-on-8th-amendment-18th-jan-2018/

[1060] *Id.*

Beginning a move towards the eventual public understanding of abortion as a right rather than a sin or crime, this discourse captured new audiences at different levels. Established human rights NGOs, who had shied away from engaging the thorny issue of abortion reform, launched public campaigns for abortion rights. Grassroots pro-choice activists who had long been shunned and stigmatized gained legitimacy in the public eye. And younger women who experienced public deliberations on their reproductive freedom for the first time organized in outrage at what they heard.

Similarly, the movement's iterative human rights challenges to the 8th using UN Treaty Monitoring Bodies engendered both legal and political benefits. During the four years preceding the May 2018 referendum, abortion rights advocates targeted the UN human rights processes every year to highlight the conflict between Irish abortion law and international human rights standards. Securing recognition of these claims by international human rights bodies provided important legal precedents with which the movement could criticize the State while also helping to educate the public on the harms of Ireland's abortion law. And by facilitating collaboration and networking among disparate groups and providing a training ground for new advocates, human rights processes helped increase the organizational power of the Irish abortion rights movement.

But as Chapter 2 explains, as the abortion rights movement gained more and more power, international human rights law ran out as a resource. By mid-2017, the question in Irish abortion politics was no longer *whether* the government would hold a referendum to reform the 8th, but what shape that legal reform would take.[1061] As some politicians began to propose legislation that would permit women to have abortion in the so-called "hard cases" of rape, women's health, and fatal fetal abnormalities, many abortion-rights advocates emphatically argued that excluding women who choose abortion for other reasons was untenable.[1062] Within this context, human rights law lost much of its former utility. Because human rights law protects abortion rights in limited cases—to protect a woman's life and health, following rape, and to terminate pregnancies with fetal anomalies—international standards contradicted the movement's demand for "free, safe and legal" abortion for all women.

With the benefit of hindsight, we know that the abortion rights movement was vindicated in its rejection of proposals for more modest reform: when the public voted for Repeal of the 8th, they also voted for prospective regulation guaranteeing access to abortion without restriction as

[1061] Fiona de Londras, *Politicians left with nowhere to hide on abortion*, THE IRISH TIMES (April 26, 2017)

[1062] *See supra* note _ and accompanying text. *See also*, Pat Leahy, *Varadkar rejects 'hard cases' suggestions from No campaign* THE IRISH TIMES (May 23, 2018) https://www.irishtimes.com/news/politics/varadkar-rejects-hard-cases-suggestions-from-no-campaign-1.3504835

to reason up to 12th weeks of gestation. Replacing a near-total ban on abortion, Repeal was a stunning victory for abortion rights and a decisive repudiation of gender inequality it serviced.

As Chapter 3 explains, the 8th amendment was a bulwark of gender inequality in Ireland. The amendment was not introduced to criminalize abortion in Ireland – this was already unequivocally the status quo. Rather, the campaign for an anti-abortion amendment was motivated, in large part, out a desire to safeguard the traditional role of Irish women as child-bearers and rearers.[1063] Concerned by the State's legalization of access to contraception in the late 1970s, social conservatives were vexed that the nations patriarchal order may come undone. To gain ground against any other gestures towards women's equality, they launched a constitutional campaign to reassert Irish women's role as mothers. Proposed as the "pro-life" amendment, the law guaranteed "the right to life of the unborn" with equivalence to the right to life of the "mother". Without much difficulty, anti-abortion campaigners secured the support of the political elites to hold a referendum on the amendment, and shortly after, they won the support of the voting public.

As a consequence of the anti-abortion campaign's success, the 8th amendment and its gendered ideology controlled Irish abortion law for 35 years. Criminalizing access in all cases except where a woman's life was at risk, only the dying woman was permitted to shirk her role. The notion of women as child-bearing vessels was so strong even in cases where the pregnancy was not viable; the law required a woman to continue her pregnancy. Rejecting women's decisions about pregnancy, the law treated women as reproductive instruments rather than as autonomous, rights-holding citizens.

Chapter 2 describes how women challenged this gender hierarchy through public campaigns for law reform, but in Chapter 3, we see how women's lived experiences under the law also contested the State's dictates. Every year, thousands of abortion-seeking women "traveled" (as it euphemistically became known) or bought abortion pills illegally online. Despite the law's attempts to control their decisions, women persistently asserted their agency. But, for rejecting the State's normative ideals for women, they were punished. Criminalized or expelled from the State for making their own decisions about motherhood and pregnancy, women endured significant burdens of exclusion, stigma, and shame.

Assessed in light of the Irish abortion story, international human rights law seems devoid of an understanding of the gendered implications of abortion restrictions. This happens in three main ways. First, the gender

[1063] Chapter 3, section II.

biases that animate anti-abortion law receive little scrutiny in human rights law jurisprudence. By treating abortion as a matter of cultural morality—and thus an issue on which States are entitled to wide deference—the European Court abdicates its power to review the discrimination caused by abortion restrictions. In parallel, the doctrine tends to narrow its review of discriminatory State action by holding individuals, rather than law and policy, accountable for the wrongs inflicted upon women. Blind to gender, international human rights law is 'blind' to the source of the problem.

Second, the jurisprudence appears critically inattentive to the ways that anti-abortion legislation injures women's autonomy or impairs women's status more broadly. The doctrinal approaches pursued—recognizing abortion as an aspect of the right to freedom from cruel, inhuman, and degrading treatment, the right to health, the right to privacy, and to a limited extent, the right to non-discrimination— presents the harms of abortion denial as an encroachment upon women's health, rather than women's socio-political freedom. Underplaying the gendered nature of women's injuries when denied abortions, the law fails to understand women's interests as sufficiently systematic and political so as to implicate rights guarantees.

Third, human rights law's conception of women runs the risk of devaluing women's agency in much the same way as restrictive abortion laws. By conditioning its recognition of abortion rights to cases of rape, fetal abnormality, or to where necessary to protect a woman's life or a woman's health, the law institutes a hierarchy of rights-holders. And the less agency a woman displays, the more likely she is to be recognized as worthy of rights.

Common to all threads of this critique is international law's failure to be sincere about "respecting women's choices." The insincerity excludes most abortion-seeking women from the law's protection. But it also tracks in the doctrine's failure to interrogate the real reasons for why women are denied abortions. Blind to the invidious gender stereotypes and disdain for women's autonomy that drive anti-abortion legislation, current doctrine could be impugned for sanctioning gender inequality.

This dissertation concludes by warning that international human rights law's struggle to meaningfully engage gender may have implications beyond abortion rights; in the current political environment where regressive actors—also known as "anti-rights"[1064] or "anti-gender" actors—are waging legal and political campaigns against gender equality, human rights law's relative inability to give sustained treatment to gender may even be urgent. The anti-rights actors who call on States to roll back human rights protections for women and LGBT+ persons forcefully allege that gender is an ideology

[1064] *See,* e.g., Observatory on the Universality of Rights, *Rights at Risk: The Observatory on the Universality of Rights Trends Report 2017,* https://www.awid.org/publications/rights-risk-observatory-universality-rights-trends-report-2017

that is set upon harming families, children, freedom of religion or belief, and even women's "sex-based" rights. And such attempts to rollback myriad rights, including rights to abortion and contraception, same-sex marriage, parental rights for same-sex couples, self-determination rights for gender-diverse persons, access to assisted reproductive technologies, and to comprehensive sexuality education, are increasingly breaking ground.[1065] Attempts to mitigate these movements without addressing gender will not be sufficient to the task.

[1065] *See* UN Human Rights Council, Report of the Special Rapporteur on freedom of religion and belief (2020) A/HRC/43/48.